In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-598

NELLIE MAE SPARKMAN,
Petitioner,

vs.

JAMES E. CARTER and EMPLOYERS SURPLUS LINES INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Florida. The revised decision was entered August 3, 1976.

CITATION TO OPINION BELOW

The revised opinion of the Florida Supreme Court rendered August 3, 1976 is reported at 335 So.2d 802 and is printed herein as Appendix A.

JURISDICTION

The decision of the Supreme Court of Florida was originally entered on May 5, 1976. A timely Petition for Rehearing was filed by the Petitioner, Nellie Mae Sparkman, on May 13, 1976. On May 28, 1976 the Petitioner filed a Motion to Amend the Petition for Rehearing. On August 3, 1976 the Supreme Court of Florida entered an Order revising its original opinion and entered the revised opinion of the Court. Except with regard to the revised portion of the decision, the Petition for Rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

POINT I

DOES THE REQUIREMENT OF MANDATORY MEDIATION FOUND IN FLORIDA STATUTE §768.133 VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

POINT II

DOES FLORIDA STATUTE §768.133 F.S.A. VIOLATE THE DUE PROCESS GUARANTEES OF AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION?

POINT III

DOES FLORIDA STATUTE §768.133 F.S.A. VIOLATE PLAINTIFF'S CONSTITUTIONALLY GUARANTEED RIGHT TO A TRIAL BY A JURY OF HER PEERS?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV, Section 1

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED AND ASSERTED AS UNCONSTITUTIONAL

(Subsections Renumbered by Division of Statutory Revision)

768.133 Medical liability mediation panels; membership; hearings

(1)(a) Any person or his representative claiming damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, hospital, or health maintenance organization against whom he believes there is a reasonable basis

for a claim shall submit such claim to an appropriate [medical liability mediation][1] panel before that claim may be filed in any court of this state.

(b) Claims shall be made on forms provided by the circuit court and shall be filed initially with the clerk of that court, with copies mailed to the person against whom the claim is made and to the administrative board licensing such professional. Service of process shall be effected as provided by law. Constructive service of process may be effected as provided by law.

(c) All parties named as defendants in the claim shall file an answer to such claim within 20 days of the date of service. No other pleadings shall be allowed. If no answer is filed within such time limit, the jurisdiction of the mediation panel over the subject matter shall terminate, and the parties may proceed in accordance with law.

(2) The chief judge of each judicial circuit shall prepare a list of persons [available][1] to serve on medical liability mediation panels whose purpose shall be to hear, and facilitate the disposition of, all medical malpractice actions arising within the jurisdiction of the circuit. The number of persons on the list shall be determined by the chief judge, but [they][1] shall be in sufficient numbers to efficiently carry out the intent of this section. Each hearing, as hereinafter provided for, shall be before a three-member panel, hereinafter referred to as the "panel," "mediation panel," or "hearing panel," composed as follows: a judicial referee, who shall be the presiding member of the hearing panel; a licensed physician; and an attorney. The judicial referee shall be a circuit judge. Such appointments [of judicial referees][1] shall be made by a "blind" system. The other panel members shall be selected in accordance with the following procedure:

(a) A list of physicians licensed to practice under chapter 458 or chapter 459 shall be prepared by the chief judge. In making the list, the chief judge may accept the recommendations of recognized professional medical societies. The list shall, if possible, be divided into lists of physicians according to the particular specialty of each.

(b) A list of qualified attorneys shall be prepared by the chief judge. In making the list, the chief judge may accept the recommendations of recognized professional legal societies.

(c) Names of physicians and attorneys may be added to, or taken off, the panel list at any time by the chief judge at his discretion; however, all names added to the list shall be placed at the bottom of the list.

(d) A physician or attorney selected to be on the hearing panel for a particular case may disqualify himself or be challenged for cause.

(e) A filing fee not to exceed $25 shall be established by the chief judge in each circuit and shall be paid to the clerk of the circuit court. The filing fee shall be used to meet such incidental expenses as the panel may incur.

(f) Within 30 days after service of process, the parties shall file with the clerk a document designating the type of medical specialist who should hear the claim. In the event the parties do not agree on the specialist, the judicial referee shall make the determination. In no event shall more than one medical practitioner serve on a mediation panel.

(g) If both parties agree upon a doctor and an attorney to serve on the hearing panel, they may so stipulate. In the event no agreement is reached within 10 days after

determination of the specialty of medical practice involved, the clerk shall mail to the parties and the panel members hereinafter described the names, selected at random, of five attorneys who are members of the hearing panel [list][1] and the names, selected at random, of five physicians of the designated specialty who are members of the hearing panel [list][1] or, if it is impractical to designate the physicians by specialty, the names, selected at random, of five physicians without regard to specialty. Thereafter, the panel members so selected shall have 10 days within which to disqualify themselves, and the parties shall have the same time in which to challenge panel members for cause. A decision on challenges for cause shall be made by agreement or by the judicial referee. If there are disqualifications or challenges for cause, the clerk shall appoint additional panel members as required. Thereafter, from the lists of five attorneys and five physicians, the parties shall agree on one attorney and one physician to serve on the hearing panel. If the parties are unable to agree, each side shall then strike names alternately from the attorneys' list and from the physicians' list separately, with the claimant striking first, until each side has stricken two names from each list. The remaining attorney and physician shall serve on the hearing panel.

(3) The clerk shall, with the advice and cooperation of the parties and their counsel, fix a date, time, and place for a hearing on the claim before the hearing panel. The hearing shall be held within 120 days of the date the claim was filed with the clerk unless, for good cause shown upon order of the judicial referee, such time is extended. Such extension shall not exceed 6 months from the date the claim is filed. If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject mat-

ter shall terminate, and the parties may proceed in accordance with law.

(4) The filing of the claim shall toll any applicable statute of limitations, and such statute of limitations shall remain tolled until the hearing panel issues its written decision or the jurisdiction of the panel is otherwise terminated. In any event, a party shall have 60 days from the date the decision of the hearing panel is mailed to the parties or the date on which the jurisdiction of the panel is otherwise terminated in which to file a complaint in circuit court.

(5) All parties shall be allowed to utilize any discovery procedure provided by the Florida Rules of Civil Procedure. Any motion for relief arising out of the use of such discovery procedure shall be decided by the judicial referee. The judicial referee may in his discretion make reasonable limitations on the extent of discovery.

(6) The claim shall be submitted to the hearing panel under such procedural rules as may be established by the Supreme Court, however, strict adherence to the rules of procedure and evidence applicable in civil cases shall not be required. Witnesses may be called; all testimony shall be under oath; testimony may be taken either orally before the panel or by deposition; copies of records, x-rays, and other documents may be produced and considered by the panel; and the right to subpoena witnesses and evidence shall obtain as in all other proceedings in the circuit court. The right of cross-examination shall obtain as to all witnesses who testify in person. Both parties shall be entitled, individually and through counsel, to make opening and closing statements. No transcript or record of the proceedings shall be required, but any party may have the proceedings transcribed or recorded. The judge presiding at the hearing shall not preside at any trial

arising out of the claim or hear any application in the case not connected with the hearing itself. No other hearing panel member shall participate in a trial arising out of the claim, either as counsel or witness.

(7) Within 30 days after the completion of any hearing, the hearing panel shall file a written decision with the clerk of the court who shall thereupon mail copies to all parties concerned and their counsel. The panel shall decide the issue of liability and shall state its conclusion in substantially the following language:

(a) "We find the defendant was actionably negligent in his care or treatment of the patient and we, therefore, find for the plaintiff"; or

(b) "We find the defendant was not actionably negligent in his care or treatment of the patient and we, therefore, find for the defendant."

The decision shall be signed by all members of the hearing panel; however, any member of the panel may file a written concurring or dissenting opinion.

(8) After a finding of liability, if the adverse parties agree, the panel may continue mediation for the purpose of assisting the parties in reaching a settlement. In such event, the panel shall also make a recommendation as to a reasonable range of damages, if any, which should be awarded in the case. The recommendation as to damages shall include, in simple, concise terms, some breakdown as to the portion of the recommended damages attributable to:

(a) Past and estimated future health or custodial care expenses attributable to the alleged malpractice, or

(b) Any of the other elements of damage:

1. Enumerated in s. 768.21 for wrongful death, or

2. Recognized by the Florida Standard Jury Instructions as elements of damages in injuries due to negligence.

However, the panel shall not have the right to determine punitive damages. Any findings of damages shall not be admissible in evidence in a subsequent trial.

(9) No member of the hearing panel shall be liable in damages for libel, slander, or defamation of character of any party to the mediation proceedings for any action taken or recommendation made by such member acting within his official capacity as a member of the hearing panel.

(10) The provisions of subsections (1) through (9) shall not be applicable to any case in which formal suit has been instituted prior to the effective date of those subsections, which shall be July 1, 1975.

Added by Laws 1975, c. 75-9, §§ 5, 6, eff. May 20, 1975.

STATEMENT OF THE CASE

On July 18, 1975 Petitioner, Nellie Mae Sparkman, filed suit in the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida against Respondent, James E. Carter and Argonaut Insurance Company, alleging negligent medical treatment on the part of Respondent, Carter, giving rise to serious and severe injuries to Petitioner, Sparkman.

Respondent, Carter, contested the Lower Court's jurisdiction over Argonaut Insurance Company by alleging in a Motion to Dismiss that his malpractice insurance carrier was, in fact, Employers Surplus Lines Insurance Company.

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[1]Bracketed words inserted by the division of statutory revision.

Under procedures established by the Florida Rules of Civil Procedure, Petitioner dropped Argonaut Insurance Company as a party defendant and amended her complaint to add as a party defendant, Employers Surplus Lines Insurance Company.

Respondent, Carter, on July 31, 1975 moved the Lower Court to dismiss the suit filed against him on the grounds that the Lower Court lacked jurisdiction of the subject matter of the suit and that Petitioner had not complied with Sections 5 and 6 of Chapter 75-9, Florida Session Laws of 1975, which contains Florida Statute §768.133 F.S.A. Chapter 75-9 of the 1975 Florida Session Laws is entitled, "Medical Malpractice Reform Act". The Act is printed herein as Appendix B.

By virtue of the Respondent's Motion to Dismiss, the constitutionality of Florida Statute §768.133 F.S.A. was clearly placed in focus in the Lower Court.

By Order of September 10, 1975 the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida entered an Order holding Florida Statute §768.133 F.S.A. unconstitutional on the grounds that it violated Amendments V and XIV of the United States Constitution and Article I, Sections 2 and 9 of the 1968 Constitution of the State of Florida, and Article V, Sections 2 and 13 of the 1968 Constitution of the State of Florida. On the same date the Trial Court entered a Certificate certifying the constitutional questions involved herein to the Supreme Court of Florida as involving questions "of great public interest." The two Circuit Court Orders are printed herein as Appendixes C and D.

On August 3, 1976 the Supreme Court of Florida entered the revised opinion and decision which Petitioner seeks to have reviewed.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Florida is both important and serious to all of the citizens of Florida. The cause was originally certified to the Florida Supreme Court by the Trial Court as involving questions "of great public interest". The constitutional issues involved affect the rights of citizens throughout Florida. Moreover, the holding of the Supreme Court of Florida that the "Medical Malpractice Reform Act" is constitutional affects not only the rights of citizens throughout Florida, but establishes precedent for legislators in other states to rely upon in drafting similar acts which would deprive their citizens of equal protection of the laws, access to the Courts of their state, due process of the law, and similar fundamental constitutional guarantees in order to shower benefits upon a favored class of persons. If Florida Statute §768.133 is allowed to stand it will also apply to malpractice actions sought to be filed in United States District Courts on the basis of diversity of citizenship. If the decision of the Supreme Court of Florida is allowed to stand, fundamental substantive rights of citizens throughout Florida and this nation will have been eradicated. Furthermore, the Florida Supreme Court's approval of the Act may cause it to be used as a model and guide for similar acts in other states and throughout the nation.

In addition, on May 14, 1976 the Supreme Court of Illinois rendered its decision in *Wright* v. *Central DuPage Hospital Asso.*, 347 N.E.2d 736 (Ill. 1976) holding a similar malpractice reform act passed by the Illinois legislature unconstitutional. *Wright* declares the Illinois malpractice act violative of the equal protection and due process guarantees of the United States Constitution. The decision by the Illinois Supreme Court and the decision by the

Florida Supreme Court cannot be reconciled. Turmoil and inconsistency have been created within the law relative to the equal protection and due process guarantees of the United States Constitution.

ARGUMENT

POINT I

Does the Requirement of Mandatory Mediation Found in Florida Statute §768.133 Violate the Equal Protection Clause of the United States Constitution?

Florida Statute 768.133 provides in pertinent part as follows:

1. Claims are filed on Florida Circuit Court forms and filed in the Circuit Court with service of process and constructive service as provided by law [768.133(1)(b)];

2. The Defendant doctor or hospital may file an answer to the claim within 20 days of service. However, the doctor may also elect not to answer (and thus not submit to mediation) in which case the jurisdiction of the mediation panel terminates [768.133(2)];

3. The chief judge of each state court judicial circuit prepares a list of available persons to serve on a medical liability mediation panel to hear and *facilitate disposition* of all medical malpractice actions [768.133(1)];

4. The number of persons on the list are determined by the chief judge. Thus, different circuits will have a different number of prospective panel members [768.133(1)];

5. Each hearing is before a three-member panel composed of a *judicial-referee* (presiding member of panel), licensed physician and attorney [768.133(1)];

6. The judicial referee is a *state circuit court judge* [768.133(1)];

7. Judicial referees shall be appointed by a blind system [768.133(1)];

8. The list of qualified physicians and attorneys is to be prepared by the chief judge [768.133(1)(b)(c)];

9. The physician or attorney selected for membership on the panel may disqualify himself or be challenged for cause [768.133(1)(d)];

10. A filing fee not to exceed $25.00 is established by the chief judge and payable to the Clerk of the Circuit Court [768.133(1)(e)];

11. Within 30 days after service of process the parties shall file with the Clerk of the Circuit Court a document designating the type of medical specialist who should hear the claim. If the parties do not agree, the judicial referee makes the determination [768.133(1)(f)];

12. Parties may stipulate as to the attorney and doctor to serve on the panel; otherwise the procedure is set forth for random selection with challenges for cause [768.-133(3)];

13. The Clerk of the Circuit Court (with cooperation of parties and counsel) fixes a date for the hearing before the panel. The hearing is to be held within 120 days of filing of claim unless otherwise extended for good cause, not to exceed 6 months. If no hearing is held within 10 months of the filing date, the jurisdiction of the panel terminates and the parties may proceed in accordance with

law [768.133(4)]; (No explanation is given as to how a hearing could possibly be held 7, 8, 9, or 10 months after the claim is filed if the longest extension of time that can be obtained is 6 months.)

14. Filing of a claim tolls the statute of limitations until the hearing panel issues its written decision or jurisdiction of the panel is terminated. The Claimant shall have 60 days from date of decision [or termination of jurisdiction] to file a complaint in the circuit court [768.-133(5)];

15. Parties may utilize all discovery procedures provided by *Florida Rules of Civil Procedure* [768.133(6)];

16. Any motions for relief arising out of use of the discovery procedure shall be decided by the judicial referee who may, in his discretion, make reasonable limitations on extent of discovery [768.133(6)];

17. Each claim is submitted to the hearing panel under procedural rules established by the Florida Supreme Court [768.133(7)];

18. Witnesses may be called; all testimony shall be under oath; testimony may be oral or by deposition or merely by reports of doctors (of which there can be no cross-examination); copies of records, X-rays and other documents may be produced and considered by panel; parties shall have right to subpoena witnesses and evidence *as in all other proceedings in the circuit court;* there shall be cross-examination *of witnesses produced at the hearing* and opening and closing statements; transcription of proceedings (if desired) may be made [768.133(7)];

19. The hearing panel shall file its written decision with the Clerk of the Circuit Court within 30 days from the hearing and the clerk shall mail copies to all parties and counsel [768.133(8)];

20. The panel shall decide the issue of liability and state its conclusion in substantially the following language:

(a) "We find the Defendant was actionably negligent in his care and treatment of the patient and we, therefore, find for the Plaintiff"; or

(b) "We find the Defendant was not actionably negligent in his care or treatment of the patient and we, therefore, find for the Defendant." [768.133(8)];

21. Any member of the panel may file a written concurring or dissenting opinion [768.133(8)];

22. After a finding of liability, if the parties so desire, the mediation panel may assist the parties in reaching a settlement. A finding of damages [unlike liability] is not admissible in evidence at a subsequent trial [768.133(9)];

23. In the event any party rejects the decision of the hearing panel, the claimant may institute litigation in the appropriate court [768.133(10)];

24. There can be no reference to insurance coverage or joinder in any civil medical malpractice action [768.-133(10)];

25. *The conclusion of the hearing panel on the issue of liability may be admitted into evidence in any subsequent trial.* Parties may comment, in opening or closing argument, on the panel's conclusion in the same manner as any other evidence introduced at trial [768.133(11)];

26. If there is a dissenting opinion, the numerical vote of the panel is admissible [768.133(11)];

27. The jury shall be instructed that the conclusion of the hearing panel is not binding but shall be accorded such weight as they choose to ascribe to it [768.133(11)].

It is readily apparent from a review of the Act that the entire medical mediation proceeding is *judicial* in nature. The reasoning of the Supreme Court of Florida in the decision sought to be reviewed dictates a similar determination that the mediation panel is a judicial body. The panel was depicted as a "pre-trial settlement conference, a procedure common in many jurisdictions at the onset of litigation" (concurring opinion of Justice England). Justice England further depicted the panel hearing as a "trial".

The United States Constitution, Amendment XIV, Section 1 guarantees that no person shall be denied "the equal protection of the laws". Equal protection of the laws is designed so that classes of persons will not be chosen to receive special treatment. The Act, though, specifically singles out one group of negligent tortfeasors, namely physicians and hospitals, and allows them favorable treatment over other tortfeasors, be they other professionals or the average citizen who is liable for automobile negligence.

Even the "procedure" before the mediation panel is discriminatory. The Claimant is barred from the Courts unless he goes through such a panel, while the defendant Doctor can "waive" the panel. It is submitted that there is no rational basis for the procedure.

Hoyt v. *State of Florida*, 368 U.S. 57 (1961) holds that the equal protection clause of the 14th Amendment not only reaches arbitrary class exclusions based on race, color, or creed, but also exclusions which tend to single out any class of persons for special or different treatment when such exclusion is not based on a reasonable classification. The act singles out physicians for priority treatment over other tortfeasors through limitation of liability, a shortened statute of limitations, benefits of arbitration without contract, and infringement upon constitutional guarantees

of those who have cause against them for negligent medical practice. See also *Lasky* v. *State Farm Insurance Co.*, 296 So.2d 9 (Fla. 1974).

Although the Act may bear some relationship to its legislative purposes, there is no substantial relationship between the Act and the alleged harm which it was intended to alleviate. The Act remains arbitrary and unreasonable. The alleged goals of the Act could have been reached through regular judicial process without the need for institution of an Act which infringes upon the constitutional guarantees of an injured party who has been wronged by negligent medical practice and without forcing contractual remedies of mediation on a party who in no way contracted away her right to jury trial in exchange for arbitration.

It is well established that legislative findings of facts may be looked to to determine the objective of the legislature and to see if the Act passed by the legislature is a reasonable exercise of legislative function in reaching those objectives. *Marvin* v. *Housing Authority*, 183 So. 145 (Fla. 1938). The findings of the legislature as set forth in the Preamble of the Act are as follows:

> "WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of $20,000 annually; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or prac-

tice defensive medicine at increased cost to the citizens of Florida; and

WHEREAS, the problem has reached crisis proportions in Florida."

In essence, the legislature found that medical professional liability insurance has "skyrocketed" and has reached "crisis proportion" in Florida and, as a result thereof, without legislative relief, there will be a serious curtailment of the services of "doctors."

Assuming this finding to be correct, the next question is whether it affords a reasonable basis to establish a special procedure for handling malpractice claims against "any medical or osteopathic physician, hospital, or health maintenance organization." The answer is that it does not because the legislative findings of fact were confined to an imminent impact of the loss of *doctors'* services, particularly high-risk physicians, and not that of *all* doctors or health maintenance organizations.

Furthermore, even though legislative findings of fact are presumed to be correct, "it is well recognized that that the findings of fact made by the legislature must actually be findings of *fact*. They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry. *Moreover, findings of fact made by the legislature do not carry with them a presumption of correctness if they are obviously contrary to proven and firmly established truths of which courts may take judicial notice.*" *Moore* v. *Thompson*, 126 So.2d 543, 549 (Fla. 1961) (Emphasis in original.) See also, 30 Fla. Jur., Statutes, §107.

Even if we interpret the legislative findings in the broadest sense—that is, if we assume the legislature really

meant to say that there is a substantial possibility of curtailment of health care services generally, then the Court should take judicial notice that this simply is not true.

The medical malpractice insurance problem does not extend to *every* class of health care providers and not every class of health care providers is on the brink of a crisis. In fact, nothing in the legislative findings of fact themselves support a conclusion that such a general crisis exists. The only findings relating to a "crisis" relate to "physicians in high-risk categories" and "doctors"; yet, the medical mediation panels must hear malpractice actions against *all* doctors and *all* health maintenance organizations—neurosurgeons, dermatologists, hospitals or what have you, not all of whom are facing a malpractice crisis.

In summary, the Act provides for a special procedure for malpractice actions against certain classes of health care providers. This special classification is based upon a legislative finding of fact which, even if true, does not afford a basis for such special treatment.

In *Sunspan Engineering & Construction Co.* v. *Spring-Lock Scaffold Co.*, 310 So.2d 4 (Fla. 1975) the Supreme Court of Florida held a provision of the Workmen's Compensation Statute unconstitutional as being violative of a citizen's right to bring suit and was further violative of equal protection. The statute provided that liability of an employer under the Workmen's Compensation Act shall be exclusive and in place of all other liability of such employer to any third party tortfeasor and to the employee and anyone otherwise entitled to recover damages from such employer on account of the employee's injury or death. The Supreme Court held that the statute arbitrarily and capriciously abolished the third party's right to sue and thus violated the constitutional guarantees of access to the Court and equal protection. Unlike the em-

ployee, the Act gave the third party nothing in return when it took away his right to bring suit at common law.

The statute was held violative of the guarantees of equal protection because it attempted to do that which the Medical Malpractice Reform Act does—it takes from the injured party the common law right to immediately bring suit but provides for no alternative right. The injured party "suffers the burdens and restrictions of the act" but receives nothing in return. Id. page 7. In *Sunspan* at page 8 the Florida Supreme Court stated:

> "All persons are presumably equal before the law and have certain inalienable rights guaranteed by the United States Constitution, i.e. Article I, §2 and XIV, §1. Specifically, it has been held that a vested cause of action, or 'chose in action' is personal property entitled to protection from arbitrary laws. *Pritchard* v. *Norton,* (1882) 106 U.S. 124, 1 S.Ct. 102, 27 L.Ed. 104; *Ross* v. *Gore,* (Fla. 1950) 48 So.2d 410; *State ex rel. Vars* v. *Knott,* (1938) 135 Fla. 206, 184 So. 752."

The Medical Malpractice Reform Act singles out the medical profession and bestows special favors upon it. It offers to the medical profession the right to reap the benefits of the panel while at the same time it offers to the medical profession the right to terminate the panel's jurisdiction if the defendant doctor or his counsel feels the decision might be adverse.

In the decision under review, the Florida Supreme Court found that the Act did not violate the equal protection clause of the United States Constitution, Fourteenth Amendment. In order to reach this result, the Florida Supreme Court rewrote the Act and engrafted into the Act a new provision in order to at least bring the Act within "the outer limits of constitutional tolerance". Id. page

806. The Florida Supreme Court construed the provisions of Florida Statute §768.133(2) to mean that in the event the physician refuses to participate in the mediation proceedings, this fact may be admitted into evidence in the subsequent suit at law. Nowhere in the statute does the legislature even hint at such a construction. It is clear that the Florida Supreme Court actually found the statute as written to be unconstitutional but upheld the statute by writing in the additional provision.

In ruling that the statute is constitutionally sound if the fact of non-participation by the defendant is admissible into evidence, the Florida Supreme Court has overlooked the distinction between the jury being told that the panel (comprised of a physician, a lawyer, and a trial judge) found the defendant to be at fault, and the jury being told that the defendant did not participate in the mediation. There are any number of reasons why a defendant might not participate in mediation, and the jury could speculate that his refusal to do so was not because he felt that the decision would be against him. Presumably the defendant could even testify at the trial that he was simply too busy to go through the mediation trial as well as a subsequent civil action. He may not have wished to incur the additional expense of defending two separate cases. He may have been of the opinion, that because of his personal knowledge of the plaintiff and/or plaintiff's attorney, that the mediation would not have accomplished anything. Thus the construction which the Florida Supreme Court has placed on the statute does not solve the unequal protection problem, which the Florida Supreme Court recognized to be inherent in the statute.

In essence the Florida Statute requires the parties to submit to mediation if the defendant desires it. The fallacy of the argument that this is not unequal protec-

tion is demonstrated by slightly changing the facts to the following hypothetical. Suppose that the legislature, instead of mediation, had required the parties to submit to lie detector tests with the results being admissible into evidence. Can it be possibly argued that a requirement for the parties to submit to lie detector tests, *at the option of the defendant*, is not a violation of equal protection? Yet there is no real distinction in that analogy. The mediation panel is a search for the truth, just as is a lie detector test. If the occurrence of the procedure is solely at the option of the defendant, it cannot possibly be logically argued that this is equal protection.

It would be more fair to all parties concerned to have the flip of a coin determine whether there would be mediation prior to a lawsuit. No one would suggest that this would be a constitutionally valid procedure, yet at least with the flip of a coin there would presumably be the same number of meritorious plaintiff's cases mediated as there would be meritorious defendant's cases. *Under the law as it presently exists, mediation is only going to occur when the defendant wishes it to occur,* which is when he feels confident of obtaining a favorable result (which is admissible into evidence).

In *Wright* v. *Central DuPage Hospital Asso.*, supra, the Illinois Supreme Court found that the portion of the medical malpractice act passed by the Illinois legislature which attempted to regulate certain medical malpractice insurance rates while not regulating others, was violative of equal protection. Supra page 744. Yet, the arbitrary and unreasonable distinctions drawn by the Florida Act would make this portion of the Illinois act seem about as objectionable as a fly on the back of an elephant.

Still, the Florida Act is violative of equal protection not only because it arbitrararily bestows upon malpractice defendants favors in order to defeat the claims of injured parties who may bring suit. It is further violative of equal protection when examined against the backdrop of the classes of health care providers who receive the benefits of Florida Statute §768.133 F.S.A.

Florida Statute §627.352 which creates the Medical Liability Insurance Commission sets forth specifically the class of persons for whom this portion of the act has been created:

> ". . . any medical or osteopathic physician, hospital, or health maintenance organization".

Similarly, the mediation panel created by F.S. §768.133 is created for the benefit of medical and osteopathic physicians, hospitals and health maintenance organizations. Yet Section 11 of the Act which creates F.S. §768.132—the Florida Medical Consent Law—establishes additional beneficiaries. It is broader and incorporates not only medical and osteopathic physicians but includes also chiropractors, podiatrists and dentists. No explanation is given for these arbitrary classifications. No explanation is given for why doctors and osteopaths receive the benefit of the mediation panel but dentists, podiatrists and chiropractors are excluded. If medical malpractice insurance rates are skyrocketing for dentists, podiatrists and chiropractors to such an extent that it is necessary to change claimants' substantive rights relative to informed consent, then why are these professionals not also required to submit to mediation? If they are excluded from mediation because they are not in the "crisis situation" that the doctors and osteopaths have persuaded the Florida Legislature that they are in then why have patients' substantive rights relative to informed consent been taken from them with reference to dentists, chiropractors and podiatrists?

The traditional test of whether an act of the Legislature denies protection of the law to a class of persons is whether the classification created by the Legislature rests upon grounds which form a reasonable and rational basis for the achievement of a valid State objective. *Turner* v. *Vouche,* 396 U.S. 346 (1970); *Reed* v. *Reed,* 404 U.S. 71 (1971); *Wiliznckí* v. *Harder,* 323 F.Supp. 509 (D.C. Conn. 1971); *Connor* v. *Finch,* 314 F.Supp. 364 (D.C. Ill. 1970), affirmed *Connor* v. *Richardson,* 400 U.S. 1003.

Where the Legislature refuses to confer a privilege or newly created right upon a certain class of persons, the classification must bear a rational relationship to a valid state objective. Equal protection requires the balancing of the governmental action taken against the private interests affected by the action. *Murray* v. *Page,* 429 F.2d 1359 (10th Cir. 1970). The Florida Legislature had no justifiable purpose in distinguishing between certain classes of professionals. It also had no justifiable purpose in distinguishing professionals from private persons. It has simply created a class of persons upon whom it chooses to confer substantial benefits to the detriment of others.

Where legislative classification infringes upon fundamental rights, such as those with which we are dealing in the instant case, the legislature must demonstrate a compelling (as opposed to a mere rational) state interest for the classification it has created. Equal protection requires that the legislation be tailored so as to impose the least possible intrusion upon those preferred rights. *Henry* v. *Betit,* 323 F.Supp. 418 (D.C. Alaska 1971). The alleviation of congested court calendars is certainly an admirable objective. The lowering of insurance rates is equally admirable. Yet nowhere in the Act did the Florida legislature address itself to the question of the relative incomes of the health care providers as compared with

other professionals and plaintiffs generally and the relative ability of health care providers to pay insurance premiums without passing the cost on to the public. Whatever the Florida legislature's laudable objectives may have been, those objectives were not accomplished by arbitrarily conferring benefits upon certain classes of persons while the general public, and specifically persons injured at the hands of negligent tortfeasors, must pay for those benefits and suffer unconscionable obstacles in an attempt to seek relief.

POINT II

Does Florida Statute §768.133 F.S.A. Violate the Due Process Guarantees of Amendments V and XIV of the United States Constitution?

Florida Statute §768.133(7) is the heart of the entire Act. It provides:

> "The claim shall be submitted to the hearing panel under such procedural rules as may be established by the Supreme Court, provided that strict adherence to the rules of procedure and evidence applicable in civil cases shall not be required. Witnesses may be called, all testimony shall be under oath, testimony may be taken either orally before the panel or by deposition, copies of records, x-rays *and other documents may be produced and considered by the panel* and the right to subpoena witnesses and evidence shall obtain as in all other proceedings in the Circuit Court. The right of cross-examination shall obtain *as to all witnesses who testify in person. . . .*" [Emphasis supplied].

Florida Statute §768.133(11) provides that the findings of the Mediation Panel are not only admissible in evidence in the subsequent civil trial but are arguable by counsel.

The jury will look at the presiding judge sitting behind the bench in his long black robe and find it very difficult to believe that it should overrule a man of such dignity and education. The party who loses before the mediation panel has little or no chance before the jury under such circumstances. That party's constitutional right to a trial by a jury of his peers will be severely jeopardized. This is the very reason that Appellate Courts are so careful to point out to trial judges that they have no right to comment on the evidence in front of the jury. The independence of the jury must be preserved. The Court should consider how this independence will be destroyed and consider in conjunction with that fact the fact that the rules of evidence are not applicable in the malpractice liability mediation panel's proceedings. Basic, fundamental principles of substantive and procedural due process have been lost. That panel's decision (which will be argued by the victor to the jury) may be rendered based upon hearsay or other objectionable "evidence". Both subsection (7) and subsection (2) of §768.133 used the word "shall". Thus, if the act is constitutional, before a claimant can proceed in the Florida Courts or in any United States District Court where there is diversity of citizenship, he must submit his claim to the hearing panel. As discussed above, the hearing panel's decision is admissible and arguable in the subsequent trial. See subsection (11). Despite this fact, the rules of evidence are not applicable in the mediation claim proceeding and the panel's decision may be based entirely upon "evidence" which would be inadmissible under long established rules. Furthermore, in complicated malpractice litigation where expert witness testimony is critical and where an expert's opinion can often change when certain facts are called to his attention or when the assumptions in a hypothetical question are modified, there is no guaranteed right of cross-examination.

Subsection (7) of Florida Statute §768.133 allows the panel to consider depositions, "copies of records, x-rays *and other documents*". A party is assured of a right of cross-examination *only as to those witnesses who testify in person.* With reference to depositions "and other documents", there is no assured right. With reference to "other documents" such as statements, medical reports, etc., the right is clearly lost. Indeed, the act even provides that "other documents may be produced and considered by the panel". Thus even where a party has done all in his power to prepare for the mediation panel hearing and has fully discovered all of the opposition's expert testimony and documents, he cannot be assured that one member of the panel (perhaps the doctor?) will not come to the hearing clutching a medical report, textbook, or other document which he considers authoritative and which is severely adverse to one party's position.

It is hard to imagine how the Florida Supreme Court could consider the procedures established by subsection (7) of Florida Statute §768.133 to meet the constitutional guarantees of due process of law.

The Florida Supreme Court's opinion really did not deal with the due process problems. Nor did it comment upon the fact that the malpractice act provides for no appellate rights on the part of any litigant. What is a litigant to do who feels that errors of law were made in the course of the panel's determination of the claim? What is the litigant to do who feels that there is no substantial basis for the panel's decision and that a decision should have been rendered in his favor as a matter of law? Perhaps an appeal may be in order to the appropriate District Court. See Fla.App. Rule 4.1 F.S.A. Yet, in the meantime, what may the litigant do to assure himself that his rights are protected during the pendency

of the appeal? If he is a defendant, there is no provision for a stay and the claimant may proceed in his action at law. From the claimant's point of view, if he finds himself with an adverse decision from the panel and wishes to appeal to the District Court, he may still be forced to go to trial because of the shortened statute of limitations. Under subsection (5) of the statute, he has only 60 days from the date of decision to file a complaint in the Circuit Court. There is no provision for a stay. Unless he files his complaint, he may very well find himself barred by the statute of limitations. The statute which was created presumably to minimize cost, expense and additional labor may not only have doubled the judicial labor but very easily could have quadrupled the cost, expense and judicial labor. Consider this hypothetical. A claimant files his claim in accordance with the statute. Ultimately, the proper expert is selected along with a local lawyer and a Circuit Judge. Eventually the case proceeds to a hearing before the mediation panel. Both the claimant and the defendant produce all of their expert witnesses and, of course, pay them and incur substantial expense in order to try their case before the hearing panel. The malpractice case is tried for a week or two weeks before the hearing panel. (Such lengthy malpractice trials are hardly unusual.) The claimant receives an adverse decision after the hearing panel has considered the case for some time. The claimant feels the hearing panel made certain errors which give rise to a meritorious appeal. But by this time the statute of limitations (which is now only 2 years) has either run or is about to run and the claimant realizes he must proceed to file his claim in the Circuit Court. He files his claim in the Circuit Court and at the same time takes his appeal to the District Court of Appeal of the State of Florida. There is no procedure for a stay of the Florida Circuit Court proceedings or a suit to be filed in the United States District Court where there is diversity of citizenship. Before the District Court can rule on the merits of his appeal, he finds himself on trial in the Florida Circuit Court or in the United States District Court. As the result of the admissibility of the panel's decision and the argument on that decision, he loses in the action at law. Then the Florida District Court renders a decision holding that the panel erred. The District Court sends the case back to the panel for a new hearing. Presumably, in order to protect himself, the claimant has also taken an appeal from the Circuit Court's final judgment. This appeal will be controlled by the decision in the previous appeal and now after two trials, two appeals, substantial time loss, substantial expense and substantial labor, the claimant comes back and finds himself ready to start all over.

Even if one does not consider the hypothetical given above, it is clear that in the very least the Act has created two trials in the place of one. Rather than reducing expense, judicial labor and complexity of litigation, the Act has compounded it. It is not unusual for malpractice cases to take longer than one week to complete. Often such trials take many weeks. Unquestionably, two members of the malpractice mediation panel, the doctor and the lawyer, will expect to be reimbursed for their time. Can one honestly say that the Act provides substantive or procedural due process to a litigant, provides a claimant with an unfettered right to an uninfluenced jury of his peers, provides immediate access to the Courts, and does not smack of special interest in violation of a claimant's right to equal protection?

In some cases, the procedures established by subsection (7) are more offensive than in others. The hearing in

front of the three member panel as established by subsection (7) may actually be numerous hearings. In some, if not most, malpractice cases, more than one physician and/or "health care provider" has been sued. Yet, the act provides that the physician may be judged only by a member of his own specialty and subsection (2) of the statute provides:

> "In no event shall more than one medical practitioner serve on a mediation panel."

Thus, the Plaintiff's delay in obtaining access to a jury and to the Circuit Courts is intolerable. In many cases, the Plaintiff will have placed herself in the hands of several doctors and/or hospitals. Under the act such a Plaintiff cannot proceed to one mediation claim. Rather, he or she must proceed to several different mediation claims before he is entitled to access to the Courts before a jury of his peers. Under the act, a hearing may not be held until as much as 120 days or even 6 months after the date of claim is filed with the clerk. Are the hearings to all be held at the same time? If so, does not this place an intolerable burden on a Plaintiff and his counsel to prepare for four different hearings? If the hearings are to be staggered, is a Plaintiff to wait 480 days or nearly a year and a half to complete all of his hearings? Thus, any plaintiff who sues more than one health care provider under the Act will not have the opportunity to present his case in a clear, concise and complete fashion.

In *Klugler* v. *White,* 281 So.2d 1 (Fla. 1973) the Florida Supreme Court stated at page 4:

> "Nor can we adopt a view which would allow the Legislature to destroy a traditional and long-standing cause of action upon mere legislative whim, or when alternative approach is available.

> "We hold, therefore, that where a right of access to the Court for redress of a particular injury has been provided by statutory law predating the adoption of the declaration of rights of the constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to F.S. §2.01 F.S.A., the legislature is without power to abolish a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."

In the instant case there is no question that the Act substantially interferes with an injured party's right to immediate access to the Court. Yet, the Act provides no reasonable alternative to protect the rights of the injured person. It provides no benefit for the injured person. The sole benefit is for the defendant and he can waive mediation by simply not filing an answer and, thus, terminating jurisdiction of the Panel.

It has been held throughout the nation that it is a deprivation of a person's constitutional rights to prevent his access to the Civil Courts. *Application of Brux,* 216 F.Supp. 956 (Hawaii 1963). Amendment V of the United States Constitution guarantees reasonable access to the Courts. *Hooks* v. *Wainwright,* 352 F.Supp. 163 (D.C. Fla. 1972). Where there is a wrong, there must be a remedy where one existed at common law. *Dancy* v. *U. S.,* 361 F.2d 75 (D.C. 1966), *appeal after remand* 395 F.2d 636 (D.C. 1968). It has been held that due process means that the problem of overcrowded dockets must not be allowed to close the door to the litigant who has statutory rights of review, nor should insurance cases be singled

out and referred for disposition while other civil cases are not so referred. See *Ingraham* v. *Richardson,* 471 F.2d 1268 (C.A. Ky. 1972).

The Federal Constitution is violated when an individual has been deprived of access to the Courts. If the legislature forces a Plaintiff to arbitrate between Plaintiff and Defendant, then Plaintiff is deprived of her right to due process. This, of course, violates her right of access to the courts. As this Court stated in *United Steel Workers of America* v. *Warrior & Gulf Nav. Company,* 363 U.S. 574, 582 (1960):

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."

See also *Gardner* v. *Shearson Hammill & Co.,* 433 F.2d 367, cert. denied 401 U.S. 978 (1970).

There is another substantial due process violation in Florida Statute §768.133. The attorney who is to sit on the panel and render a decision (which will subsequently be admissible in evidence at jury trial) is selected from a list of attorneys. Likewise, the physician who is to sit on the panel is similarly selected. There is no procedure to question these proposed panel members in order to ascertain whether they will hear the cause impartially, whether they are qualified to serve, or whether there is interest, bias or prejudice which may affect their decision. When this provision of the Statute is considered in the context of the provision of the Statute which makes the Panel's decision admissible in evidence, clear due process violations appear. Even in the Federal Courts, where the judge is allowed to express his opinion on the weight of the evidence, a Federal judge can go too far in his comments on the merits of a litigant's case. See *Bolivar* v. *Kelly,* 69 F.2d 58 (6th Cir. 1934).

POINT III

Does Florida Statute §768.133 F.S.A. Violate Plaintiff's Constitutionally Guaranteed Right to a Trial by a Jury of Her Peers?

The admissibility of the Panel's decision in the subsequent civil suit and its arguability by counsel where the decision may be based on hearsay and other questionable "evidence" violates Plaintiff's constitutionally guaranteed right to have an unbiased, impartial jury decide the merits of her claim.

No state, including Florida, may undertake to adopt a procedure (on any type of action) which would interfere with a right guaranteed by the United States Constitution. To attempt to adopt such a procedure would be to render the procedure constitutionally infirm. *Fuentes* v. *Shevin,* 407 U.S. 67 (1973); *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600 (1974).

In *Tights Inc.* v. *Stanley,* 441 F.2d 336 (4th Cir. 1971), it was held that a claim for a money judgment is indeed legal in nature and the parties have a right to a jury trial on that claim and that right to a jury trial may not be lost by combining it with a claim for injunctive relief in a patent infringement case.

It has likewise been held that criminal contempt citations require a jury trial and a procedure which denies that right to a jury trial is constitutionally impermissible. *United States* v. *Seale,* 461 F.2d 345 (7th Cir. 1972).

This Court's attention is directed to the case of *Garcia* v. *Queen Ltd.,* 487 F.2d 625 (5th Cir. 1973) wherein our Fifth Circuit, in a personal injury case by an employee against his employer and its insurers, held that where the Trial Court determined the issues of liability and dam-

ages in a trial limited to determination of the issue of insurance coverage, the plaintiff had been unconstitutionally deprived of his right to a jury trial on the issues of liability and damages. In the instant case, the Trial Court, in ruling on the Defendant's motions, determined the issue of the Defendant's ultimate liability. The Plaintiffs have been unconstitutionally deprived of their right to a jury trial.

Similarly, in the case of *Richland* v. *Crandall*, 259 F.Supp. 274 (D.C. N.Y. 1966), it was held that whenever an action is brought under Section 78J or 78N of Title 15 individually and as a representative of a class as well as derivatively, the issues pertaining to the individual and class actions are constitutionally entitled to be heard by a jury.

In the case of *Pernell* v. *South Hall Realty*, 416 U.S. 363 (1974), this Court held that the guarantees of the right to a trial by jury are protected in landlord/tenant eviction actions. The Court held that a procedure which would deny the right to a trial by jury was constitutionally infirm since the action was one at law. Likewise, in the case of *Curtis* v. *Loether*, 415 U.S. 189 (1974), this Court held that an action for damages based upon violation of the Civil Rights Act of 1968 was, indeed, an action at law and the United States District Court erred in denying the defendant a right to a trial by jury on all issues raised in the case.

Where the remedy sought by the plaintiff is money damages, the plaintiff is entitled to a jury trial on this claim. *Ross* v. *Bernard*, 396 U.S. 531, 542 (1970).

In *Olin's, Inc.* v. *Avis Rental Car System of Florida*, 131 So.2d 20, 21 (Fla. 3 D.C.A. 1961) the Florida District Court of Appeal announced the following rule:

> "The right of trial by jury exists as to those issues which were triable before a jury at common law, *regardless of the form of suit or proceeding which may be devised or used for their solution.*" [Emphasis supplied].

The Florida District Court went on to acknowledge the following rule:

> "The constitutional guarantee of jury trial must be maintained inviolate . . . Therefore, the discretion of a court does not extend to a privilege to grant or deny a requested jury trial . . . of a cause of action or issue which clearly is one which was triable by jury at common law."

The right to trial by jury cannot be impaired by state constitutional or statutory provision. *Drederick* v. *American News Co.*, 128 F.2d 144 (10th Cir. 1942). In *Wright* v. *Central DuPage Hospital Asso.*, supra, the Illinois Supreme Court declared the medical review panel procedure established by the Illinois medical malpractice act as an unconstitutional prerequisite to a jury trial. The mediation requirement was held to be an impermissible restriction on the right to trial by jury and it should be noted that the Illinois act is not nearly as flagrant a violation of constitutional guarantees as is the Florida Act. At least the Illinois act did not permit the determination of the panel to be admitted in evidence in the subsequent trial and argued by counsel.

CONCLUSION

For all reasons stated herein, Petitioner respectfully prays that the Petition for Certiorari be granted.

Respectfully submitted,

Jos. D. Farish, Jr.

F. Kendall Slinkman

Walter Stockman
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida has been furnished Heskin A. Whittaker, Esq., Whittaker, Pyle & Stump, P.O. Box 6126-C, Orlando, Florida 32803, Attorneys for Respondents; Robert Shevin, Attorney General, Capitol Building, Tallahassee, Florida 32304, Attorney for State Amicus Curiae; John E. Mathews, Jr., Esq., Mathews, Osborne, Ehrlich, McNatt, Gobelman & Cobb, 1500 American Heritage Life Bldg., Jacksonville, Florida 32202; and John E. Thrasher, Esq., 731 May Street, Jacksonville, Florida 32204, Attorneys for Florida Medical Assn. Amicus Curiae, by mail, this the 27th day of October, A.D. 1976.

F. Kendall Slinkman
Attorney

APPENDIX

APPENDIX A

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1976

CASE NO. 48,039

Circuit Court Case No. 75-2466-CA-01-F

JAMES E. CARTER and EMPLOYERS SURPLUS LINES INSURANCE COMPANY,
Petitioners,

vs.

NELLIE MAE SPARKMAN,
Respondent.

Opinion filed May 5, 1976

Writ of Certiorari to the Circuit Court in and for Brevard County, Volie A. Williams, Jr., Judge

Heskin A. Whittaker of Whittaker, Pyle and Stump, for Petitioners

Walter Stockman of Stockman and Grass, for Respondent

Robert L. Shevin, Attorney General; and Barry Silber and Donald D. Conn, Assistant Attorneys General, for Amicus Curiae

John E. Mathews, Jr. and Jack W. Shaw, Jr. of Mathews, Osborne, Ehrlich, McNatt, Gobelman and Cobb; and John

E. Thrasher, for the Florida Medical Association, Amicus Curiae

REVISED

ROBERTS, J.

This cause came to us on certificate of questions from the Circuit Court in and for Brevard County. However, since the trial court had already ruled on the questions posited[1] by it, this Court chose to treat the certificate as a petition for writ of certiorari pursuant to Article V, Section 3(b)(3) and Article V, Section (2a), Constitution of Florida. Cf. *Burnsed* v. *Seaboard Coastline Railroad Company*, 290 So.2d 13 (Fla. 1974).

The facts pertinent to the disposition of this cause, contained in the Circuit Court's certificate, are as follows:

"1. On July 18, 1975, Plaintiff filed suit in this Court against Defendants, JAMES E. CARTER, and ARGONAUT INSURANCE COMPANY said suit against Defendant CARTER being based on the alleged negligence of said defendant in treating Plaintiff for a fracture of the proximal head of the fifth metatarsal bone of her right foot.

"2. On July 31, 1975, Defendant CARTER moved this Court to dismiss said suit on the grounds that this Court lacked jurisdiction of the subject matter of the suit and of Defendant ARGONAUT, alleging inter alia, that Plaintiff had not complied with §§5 and 6 of Chap. 75-9, Fl. Sts. (1975) entitled 'Medical

1. This Court in *Boyer* v. *Orlando*, 232 So.2d 169 (Fla. 1970), declined to answer the question certified because the question certified by the Circuit Court had already been answered by it. This Court said, "Florida Appellate Rule 4.6 is not a substitute for appeal, and questions already ruled upon below cannot be certified here."

Malpractice Reform Act', which became effective on July 1, 1975 creating new §768.133 of the Florida Statutes, which statute mandatorily requires cases such as the instant case to be filed pursuant to such newly created statute as a Medical Liability Mediation Claim, to be heard first before a liability mediation panel whose presiding member and judicial referee shall be a circuit judge; that Plaintiff had not complied with such newly created statute by first filing her claim thereunder. Defendant CARTER further indicated his special appearance to contest the jurisdiction of this court over Defendant ARGONAUT, by alleging that Defendant CARTER's insurer was in fact EMPLOYERS SURPLUS LINES INSURANCE COMPANY.

"3. On August 8, 1975, Defendant's Motion to Dismiss was heard before this Court. Plaintiff opposed Defendant's Motion on the grounds that the newly created statute was unconstitutional under Amendments 5 and 14 of the United States Constitution; Article 1, §§2, 9 and 21 of the Florida Constitution, and Article 5, §§2 and 13 of the Florida Constitution specifying that the newly created statute deprived Plaintiff of the due process of the laws, and of the equal protection of the laws, and that the newly created statute expressly and illegally controverts the 1968 holding of the Florida Supreme Court in the case of Shingleton vs. Bussey, 223 So.2d 713. It was Plaintiff's position that:

"a. The new statute, making it *mandatory for a Plaintiff to first submit to mediation* before filing a suit for relief in a court of law, while at the same time *a defendant physician was allowed the option of submitting his defense to such* claim to mediation

(§5, Chap. 75-9, Laws of 1975, 4th Legislature of Florida; Fl. St. 768.133(2)) (emphasis supplied), was a denial of due process and the equal protection of the laws under the United States and Florida Constitutions.

"b. The requirement of the new statute that in any civil medical malpractice action, the trial on the merits shall be conducted without reference to insurance, insurance coverage or joinder in the suit of the insurer as a co-defendant, was likewise unconstitutional under the above cited constitutional references.

"c. The new statute did not treat Plaintiff and Defendant herein equally thereby denying Plaintiff her basic rights under Article 1, §2 of the Florida Constitution.

"d. The new statute restrained Plaintiff from timely access to the Courts thereby violating Article 1, §21 of the Florida Constitution."

The trial court denied the motion to dismiss, agreed with plaintiff's contentions, and specifically found that Section 768.133, Florida Statutes (Chapter 75-9, §5, Laws of Florida) is unconstitutionally violative of Amendments 5 and 14 of the Constitution of the United States, Article I, and Sections 2 and 9 of the Constitution of Florida in that it denies the plaintiff her basic constitutional rights to due process and equal protection of the law; that said section constitutes class legislation designed solely for the defendant physicians in suits for their malpractice based on negligence by requiring plaintiff to first submit to mediation before filing a suit for damages in a court of law while at the same time the physician is allowed the option of submitting his defense to such claim by not being required to plead to such a claim; that it violates Sections

2 and 13, Article V, Constitution of Florida, in that the Legislature in creating said statute infringed on the constitutional rights of the Supreme Court to regulate practice and procedure in the courts of Florida. Section 768.133 as contained in Chapter 75-9, Section 5, Laws of Florida, with which the trial court is concerned, sub judice, also provided:

> "(10) In the event any party rejects the decision of the hearing panel, the claimant may institute litigation based upon the claim in the appropriate court. Furthermore, in any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, insurance coverage or joinder in the suit of the insurer as a co-defendant."

However, apparently pursuant to Section 11.242(5), the Statutory Revision Division transferred this Section to Section 768.134, Florida Statutes.

Although we find that the several constitutional attacks on the validity of Sections 768.133 and 768.134(1), Florida Statutes, relative to medical liability mediation panels are without merit, we find that the contention that the act violates constitutional equal protection guarantees merits discussion and necessitates an effective construction of the act so as to resolve the doubts of constitutionality in favor of the act.

It is incumbent on this Court when reasonably possible and consistent with constitutional rights to resolve all doubts as to the validity of a statute in favor of its constitutional validity and if possible a statute should be construed in such a manner as would be consistent with the constitution, that is in such a way as to remove it farthest from constitutional infirmity.

In oral argument much was said contending that the physician under the Florida Medical Consent Law has the "best of two worlds" in that he has a choice between participating in the administrative hearing or not participating; whereas, the plaintiff who is claiming damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, hospital, or health maintenance organization against whom he believes there is a reasonable basis for a claim, must submit his claim to an appropriate medical mediation panel before he may file a claim in the state courts. If both plaintiff and physician participate in the mediation proceedings, the result becomes admissible into evidence (Section 768.134(2), Florida Statutes), but the statute is silent as to the admissibility of non-participation by the physician. Contention was made that such an arrangement violates the equal protection clause of the Constitutions of the United States and of Florida. We agree and construe the statute to mean that in the event the physician fails to participate in the administrative hearing after plaintiff has done so, such fact is admissible into evidence in any subsequent civil medical malpractice trial. We realize that certain items of expense in relation to the mediation attempts will be incurred, but it would naturally follow that such expenses to the extent of reasonableness would become a part of the costs of the judicial proceedings, taxable against the losing party.

Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access, there may be reasonable restrictions prescribed by law. Typical examples are the fixing of a time within which suit must be brought, payment of reasonable cost deposits, pursuit of certain administrative relief such as zoning matters or workmen's compensation claims, or the requirement that newspapers be given the right of retraction before an action for libel may be filed.

Cases are legend which hold that the police power of the state is available in the area of public health and welfare, and we must, therefore, consider matters pursued under the law sub judice as being separate and distinct from those generally flowing from the marketplace. At the time of enactment of the legislation in question sub judice, there was an imminent danger that a drastic curtailment in the availability of health care services would occur in this state. The Legislature's recognition of the crisis in the area of medical care and the need for legislation for the benefit of public health in this state is evidenced by the Preamble to Chapter 75-9, Laws of Florida, as follows:

"WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and

"WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of $20,000 annually; and

"WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and

"WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida, and

"WHEREAS, the problem has reached crisis proportion in Florida, NOW THEREFORE,"

The Legislature felt it incumbent upon itself to attempt to resolve the crisis through exercise of the police power for the general health and welfare of the citizens of this State and accordingly enacted Chapter 75-9, Laws of Florida, to effectuate that purpose. The statutes involved here deal with matters related directly to public health and obviously have for their purpose an effort to have the parties mediate claims for malpractice thereby reducing the cost of medical malpractice insurance and ultimately medical expenses.

Even though the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance, we do not deem it sufficient to void the medical malpractice law.

By Section 768.133(10) of Chapter 75-9, Laws of Florida,[2] which in relevant part provides:

> "Furthermore, in any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, insurance coverage, or joinder of an insurer as a co-defendant in the suit."

The Legislature intended to bar only "any reference" to the joinder of insurers rather than the joinder itself.

"References" to insurance or insurers during the course of trial is a purely procedural matter having to do with the conduct of trial proceedings.[3] To the extent the Legislature has attempted to control "references" during the course of trial in this provision, it has acted beyond its power.[4]

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2. This provision now appears as Section 768.134(1), Florida Statutes (1975).

3. Cf. In Re Clarification of Florida Rules of Prac. & Proc., 281 So.2d 204 (Fla. 1973).

4. Article II, Section 3, Constitution of Florida; Article V, Section 2(a), Constitution of Florida.

In view of the apparent wisdom of continuing the policy expressed in the questionable portion of this statute, we adopt the substance of this portion of Section 768.134 (1), Florida Statutes (1975), as a rule of procedure for all medical malpractice trials conducted or in process under the statute.

> *"Rule 1.450(e)*—In any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, to insurance coverage, or to the joinder of an insurer as co-defendant in the suit."

Having carefully considered all other points on appeal, we find them to be without merit.[5]

Accordingly, we hold that Sections 768.133 and 768.134, Florida Statutes, both being progeny of Chapter 75-9, Laws of Florida, as constructively construed are constitutional. The order of the trial court is reversed and the cause is remanded for proceedings consistent herewith.

It is so ordered.

OVERTON, C.J., ADKINS, BOYD, SUNDBERG and HATCHETT, JJ., Concur; ENGLAND, J., Concurs with an opinion, with which OVERTON, C.J., SUNDBERG and HATCHETT, JJ., Concur.

ENGLAND, J., concurring.

I concur with the majority in its general attempt to sustain the validity of the medical liability mediation panel statute against a variety of constitutional attacks. As my colleagues have done, I start with the notion that the

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5. Cf. In Re Transition Rule, 316 So.2d 38 (Fla. 1975), Rule 1.010, Rules of Civil Procedure, *Lasky* v. *State Farm Insurance Co.*, 296 So.2d 9 (Fla. 1974), *Kluger* v. *White*, 281 So.2d 1 (Fla. 1973).

Legislature is free to enact legislation necessary to deal with a public health crisis which it perceives within the state, and I accept fully as a premise to our review that the legislative solution to the perceived problem must be sustained if it is reasonably related to the purpose sought to be achieved. I have no problem in concluding that the Legislature quite reasonably approached the public health crisis in Florida by seeking to remove from the court system of the state those medical malpractice cases which are patently frivolous or clearly meritorious, and those which are subject to settlement after the parties have been brought together with a disinterested mediator. In fact, it is likely that the Legislature will more frequently attempt to accommodate the resolution of individual disputes without the use of the judiciary in areas where other forums or procedures can readily provide adequate dispute adjustment.[1]

Starting from these premises, I find it necessary to analyze separately the several arguments presented against the validity of Florida's medical liability mediation panel statute.

1. Sparkman argues the constitutional invalidity of this statute on the basis of the privileges and immunities clause and the due process clause of the Fourteenth Amendment to the United States Constitution. Her suggestion that the act abrogates her "privilege" to select a judicial forum rather than a mediation panel is not persuasive.

1. The Legislature has already diminished the role of the judiciary in Florida in the areas of marriage dissolution (Chapter 71-241, Laws of Florida, relating to "no fault" divorce), probate (Chapters 74-106 and 75-220, Laws of Florida, adopting the Uniform Probate Code), and tort litigation arising from motor vehicle mishaps (Chapter 71-252, Laws of Florida, relating to "no fault" insurance). See also papers presented by Chief Justice Warren Burger and others at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held in St. Paul, Minnesota on April 7-9, 1976.

A judicial forum is available after the mediation panel has completed its work or been terminated, and it has never been a constitutional "privilege" to file a lawsuit in a judicial tribunal in the first instance. See, among others, *Florida Welding & Erection Svc., Inc.* v. *American Mutual Ins. Co.*, 285 So.2d 386 (Fla. 1973), requiring an exhaustion of administrative remedies. Nor can I accept Sparkman's suggestion that she has been denied "liberty . . . without due process of law" because of the statutory restriction placed on malpractice suits prior to the institution of civil litigation in a court of law. The act specifically tolls the statute of limitation upon filing a claim with the mediation panel,[2] so there can be no loss of substantive rights to a plaintiff by reason of being required to go before a mediation panel before filing a complaint in court. In fact, under the statute, a claim is first filed with the mediation panel through the clerk of the circuit court,[3] the same place a complaint for any other lawsuit would normally be filed. The mediation panel becomes, in essence, akin to a required pre-trial settlement conference, a procedure common in many jurisdictions at the onset of litigation.[4]

2. Sparkman argues that the mediation panel denies her access to the courts of Florida in violation of Article I, Section 21 of the Florida Constitution. It troubles me that persons who seek to bring malpractice lawsuits must be put to the expense of two full trials on their claim, assuming the medical defendant chooses to put plaintiff to her proof before the panel. Obviously, this procedure favors the medical defendant over a certain category of claimants who have limited resources. The only reciprocal

2. Section 768.133(4), Fla. Stat. (1975).

3. Section 768.133(1)(b), Fla. Stat. (1975).

4. See, for example, U.S. Dist. Ct. Rule 14 B (S.D. Flo.).

benefit given plaintiffs under the statute is the ability to have the mediation panel's decision admitted into evidence at the later trial, a benefit which is only valuable if the plaintiff prevails before the mediation panel and in any event is fully equated by the reciprocal evidentiary right given to the defendant. While I find the inequity in this procedure harsh to a large and undefined class of litigants, I cannot in good conscience invalidate the statute on that basis. A disparity of resources has always been an imbalance in litigation which the courts are relatively powerless to adjust. Accordingly, although I might have preferred a more delicate balance for this type of litigation, I cannot conclude that the Legislature was unreasonable in setting a procedure for this class of lawsuit which has widened existing disparities.[5]

3. Sparkman argues that judges may not serve on medical mediation panels by reason of Article V, Section 13 of the Florida Constitution, directing that judges shall devote full time to their judicial duties. I do not agree. The responsibilities of judges assigned to mediation panels are "judicial duties" even though they are exercised before litigation is formally commenced with a "complaint". We essentially held as much when we adopted procedural rules for panel proceedings.[6] Moreover, since the institution of mediation panel proceedings is effected in the circuit court, I have no difficulty concluding that the statute does not thwart the constitutional directive regarding the activity of judges. There are undoubtedly areas and activities into which the Legislature may not thrust judges,

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5. My concerns are assuaged by the Court's determination that expenses incurred in the mediation panel proceeding, including the expert witness fees and travel expenses which are so costly in this type of litigation, are to be taxable costs on later trial if the plaintiff prevails.

6. In re Transition Rule 21, 316 So.2d 38 (Fla. 1975).

but I view the role assigned in this legislation as being within constitutional tolerances.

4. Sparkman argues that the rules of procedure set out in Section 768.133, Florida Statutes (1975), are improperly adopted inasmuch as Article V, Section 2(a) of the Florida Constitution directs that "the supreme court shall adopt rules for the practice and procedure in all courts . . . ." Carter counters this argument with reference to the near unanimous vote of both houses of the Legislature in adopting this statute, suggesting that the vote totals comply with the last sentence in Article V, Section 2(a), which allows the Legislature to repeal court-promulgated rules by general laws enacted by a two-thirds vote of the members of each house. I must agree with Sparkman that mere vote totals on the passage of legislation do not comply with the constitutional requirements for a repeal of court rules. To read the last sentence of Article V, Section 2(a) as authorizing a repeal of court-promulgated rules every time the Legislature votes by more than two-thirds of the members in both houses would create chaos. I cannot believe that the constitutional provision does not require knowledge and specific intent on the part of each chamber that their action is intended to override the judgment of the Supreme Court as to a specific rule of practice or procedure. See *In re Clarification of Florida Rules of Practice and Procedure,* 281 So.2d 204 (Fla. 1973). That requisite specificity of intent is required when the Legislature overrides the Governor's veto of any legislation or appropriation.[7] The separation of powers directed in Article II, Section 3 of the Florida Constitution, as well as the comity necessary to make the separation work effectively, necessitates an individual and direct vote to override a specific rule of court.

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7. Article III, Section 8(c), Florida Constitution.

I must agree with Carter, however, that no problem under the constitutional scheme of rule-making is presented in this case. Section 768.133(6) provides that procedural rules for mediation panels are to be established by this Court, and we have already adopted rules necessary to the conduct of these proceedings.[8] All legislative interest in matters of procedure having been deferred to the Court and the Court having acted, there can be no legislative incursion into the constitutional domain of the judiciary in the area of rulemaking.

OVERTON, C.J., SUNDBERG and HATCHETT, JJ., Concur

APPENDIX B

CHAPTER 75-9

House Bill No. 1267

AN ACT relating to medical liability insurance and civil law revisions concerning medical malpractice actions; providing a short title; creating s. 627.352, Florida Statutes, relating to the creation of a medical liability insurance study commission; creating s. 395.18, Florida Statutes, authorizing certain hospitals to establish internal risk management programs; amending subsection (1) of s. 627.355, Florida Statutes, to allow total self-insurance by a group or association of physicians or health care facilities organized for any purpose; creating s. 768.133, Florida Statutes, providing for the establishment of medical liability mediation panels in each judicial circuit; providing for the filing, hearing and disposition of claims, and providing a filing fee;

8. See fn. 6 above.

providing for legal proceedings subsequent to the decision of the mediation panels; amending s. 95.11(4), Florida Statutes, 1974 Supplement, relating to the statute of limitations, to provide that actions for medical malpractice shall be commenced within two years from the time the incident occurred or the injury is discovered but not to exceed four years from the date the incident occurred; providing exceptions for fraud and misrepresentation; creating s. 768.042, Florida Statutes, to prohibit the stating of the amount of general damages in any complaint for recovery of damages for personal injury or wrongful death; amending s. 725.01, Florida Statutes, to provide that medical guarantees shall be governed by the Statute of Frauds; creating s. 768.132, Florida Statutes, entitled the "Florida Medical Consent Law"; covering consent in all cases not covered by s. 768.13, Florida Statutes, entitled the "Good Samaritan Act"; setting standards for information necessary for consent; providing a presumption where a valid consent was given; amending s. 458.1201(1)(m), Florida Statutes, and adding paragraphs (o) and (p) to said section; providing that the State Board of Medical Examiners determine standards of acceptable and prevailing medical practice; authorizing board action in medical malpractice cases and certain disciplinary cases; providing for a civil penalty; adding paragraphs (c) and (d) to s. 458.1201(2), Florida Statutes; providing for appointment of licensed physicians to act for the board; providing for immunity from liability for investigations conducted pursuant to this act; amending s. 458.1201(3)(a), Florida Statutes; authorizing board to require physicians to participate in continuing education programs; authorizing board to require physicians to practice under the direction of a physician in certain locations; adding s. 458.1201(5),

Florida Statutes; requiring the board to report to the legislature; creating s. 395.065, Florida Statues, providing for hospital disciplinary powers; adding subsection (8) to s. 627.351, Florida Statutes, to provide for a joint underwriting plan offering medical malpractice insurance coverage to be set up by the Department of Insurance and underwritten by insurers writing casualty insurance as defined in s. 624.605(1)(b),(j), and (p), Florida Statutes, and self-insurers authorized under s. 627.355, Florida Statutes; creating s. 627.353, Florida Statutes, to provide for the limitation of liability when certain provisions are met for any licensed hospital, physician, physician's assistant, osteopath or podiatrist for the amount of any settlement approved by the joint underwriting association established under s. 627.351(8), Florida Statutes, or any judgment exceeding $100,000 for any claim arising out of the rendering of medical care or services; creating a patient's compensation fund to be administered by said joint underwriting association subject to supervision by a board of governors to provide coverage for the amount of any such settlement or judgment affected by said limitation of liability; providing for fees to support the fund including an assessment against participants for deficits; providing for costs in administering or defending the fund; providing claims procedures; providing an effective date.

WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and

WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of $20,000 annually; and

WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and

WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and

WHEREAS, the problem has reached crisis proportion in Florida, NOW THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. The short title of this act shall be "The Medical Malpractice Reform Act of 1975".

Section 2. Section 627.352, Florida Statutes, is created to read:

627.352 Medical Liability Insurance Commission.—

(1) The Florida Medical Liability Insurance Commission is hereby created, consisting of the following members: the Insurance Commissioner, the Secretary of the Department of Health and Rehabilitative Services, and twelve members to be appointed. The Governor, the President of the Senate, and the Speaker of the House of Representatives shall each appoint four members to the commission. Each shall appoint a member of the legal profession, a provider of health services, a lay citizen and a representative from the insurance industry.

(2) The Insurance Commissioner shall be the chairman of the commission and shall provide records management for the commission. A majority of the commission members shall constitute a quorum for the transaction of any business or the exercise of any power or function of the commission. The affirmative vote by a majority of the quorum present at a duly called and noticed meeting

shall be required to exercise any power or function of the commission. Each member shall be entitled to one vote on all matters which may come before the commission. The commission may delegate to one or more of its members such duties as it deems proper.

(3) The Insurance Commissioner and the Secretary of the Department of Health and Rehabilitative Services may designate a representative from his agency to exercise his power and perform his duties, including the right to vote on the commission.

(4) Members of the commission serving as representatives of the general public shall receive mileage and $20 per diem for attending meetings of the commission. Each member of the commission shall be allowed the necessary and actual expenses which he shall incur in the performance of his duties under this section.

(5) On or before January 1, 1976, the commission, in cooperation and consultation with appropriate state and federal agencies, the medical and legal professions, the insurance industry and representatives of the general public, shall prepare and submit to the Governor and the legislature its report and recommendations.

(a) The goal of the plan shall be to recommend a medical liability insurance system which can be operated at reasonable cost for the purpose of providing prompt, equitable compensation to those sustaining medical injury.

(b) Primary consideration shall be given, but not limited to, establishing an insurance system which can be underwritten by private insurers on a self-supporting basis using actuarially sound rates.

(c) If the commission finds that no insurance system meeting the goal of the plan can be underwritten by private

insurers on a self-supporting basis using actuarially sound rates, it shall specify the needed changes in the statutes to create a viable market for medical liability insurance, or self-insurance.

(d) The comprehensive report shall include recommendations to the legislature for reducing the incidence of medical injuries, including establishing standards of care and procedures for peer review; reducing the cost of prosecuting and defending claims and administering the insurance mechanism, changes in existing law governing the eligibility of injured persons for compensation and the amount of compensation, including limitations on the time within which claims may be brought and the elements of loss for which compensation may be recovered and any other matters or procedures which the commission considers relevant to the medical liability insurance problem.

(e) The commission is authorized and encouraged to make interim reports to the Governor, the President of the Senate, and the Speaker of the House of Representatives concerning specific legislative proposals, which need immediate consideration.

Section 3. Section 395.18, Florida Statutes, is created to read:

395.18 Internal risk management program.—Every hospital licensed pursuant to this chapter, having in excess of 300 beds, as a part of its administrative functions, shall establish an internal risk management program which shall include the following components:

(1) The investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents causing injury to patients; and

(2) The development of appropriate measures to minimize the risk of injuries and adverse incidents to patients through the cooperative efforts of all personnel; and

(3) The analysis of patient grievances which relate to patient care and the quality of medical services. The risk management program shall be carried out either through a person on the administrative staff of a hospital, as part of his administrative duties; or by a committee of the hospital board of trustees or directors; or by the medical staff in a manner deemed appropriate.

Section 4. Subsection (1) of s. 627.355, Florida Statutes, is amended to read:

627.355 Medical malpractice insurance; purchase.—

(1) A group or association of physicians *or health care facilities, composed of any number of members,* organized for purposes other than the purchase of medical malpractice insurance, which has been in continuing existence for a period of at least 2 years, is authorized partially to self-insure against claims of medical malpractice upon obtaining approval from the Department of Insurance and upon complying with the following conditions:

(a) Establishment of a medical malpractice risk management trust fund to provide coverage against professional medical malpractice liability.

(b) Employment of a professional staff and consultants for loss prevention and claims management coordination under a risk management program.

Section 5. Section 768.133, Florida Statutes, is created to read:

768.133 Medical liability mediation panel.—

(1) The chief judge of each judicial circuit shall prepare a list of persons to serve on medical liability mediation

panels, whose purpose shall be to hear and to facilitate the disposition of all medical malpractice actions arising within the jurisdiction of the circuit. The number of persons on the list shall be determined by the chief judge but shall be in sufficient numbers to efficiently carry out the intent of this section. All hearings, as hereinafter provided for, shall be before a three-member panel hereinafter referred to as the panel, mediation panel or hearing panel composed as follows: a judicial referee who shall be the presiding member of the hearing panel, a licensed physician and an attorney. The judicial referee shall be a circuit judge. Such appointments shall be made by a "blind" system. The other panel members shall be selected in accordance with the following procedure:

(a) A list of physicians licensed to practice under chapters 458 or 459 shall be prepared by the chief judge. In making the list, the chief judge may accept the recommendations of recognized professional medical societies. The list shall be divided into lists of physicians according to the particular specialty of each if possible.

(b) A list of qualified attorneys shall be prepared by the chief judge. In making the list the chief judge may accept the recommendations of recognized professional legal societies.

(c) Names of physicians and attorneys may be added to or taken off the panel list at any time by the chief judge at his discretion, provided, however, that all names added to the list shall be placed at the bottom of the list.

(d) A physician or attorney selected to be on the hearing panel for a particular case may disqualify himself or be challenged for cause.

(e) A filing fee not to exceed $25 shall be established by the chief judge in each circuit and shall be paid to

the clerk of the circuit court. The filing fee shall be used to meet such incidental expenses as the panel may incur.

(2) *Any person or his representative claiming damages by reason of injury, death or monetary loss on account of the alleged malpractice by any medical or osteopathic physician, hospital, or health maintenance organization and against whom he believes there is a reasonable basis for a claim shall submit such claim to the appropriate panel before that claim may be filed in any court of this state. Claims shall be made on forms provided by the circuit court and shall be filed initially with the clerk of that court, with copies mailed to the person against whom the claim is made and to the administrative board licensing such professional. Service of process shall be effected as provided by law. Constructive service of process may be effected as provided by law. All parties named as defendants in the claim shall file an answer to such claim within 20 days of the date of service. No other pleadings shall be allowed. If no answer is filed within such time limit, the jurisdiction of the mediation panel over the subject matter shall terminate, and the parties may proceed in accordance with law. Within 30 days after service of process, the parties shall file with the clerk a document designating the type of medical specialist who should hear the claim. In the event the parties do not agree on the specialist, the judicial referee shall make the determination. In no event shall more than one medical practitioner serve on a mediation panel.*

(3) *If both parties agree upon a doctor and an attorney to serve on the hearing panel, they may so stipulate. In the event that no agreement is reached within 10 days after determination of the specialty of medical practice involved, the clerk shall mail to the parties and the panel*

members hereinafter described the names selected at random of five attorneys who are members of the hearing panel and the names selected at random of five physicians of the designated specialty who are members of the hearing panel, or if it is impractical to designate the physicians by specialty, the names selected at random of five physicians without regard to specialty. Thereafter, the panel members so selected shall have 10 days within which to disqualify themselves and the parties shall have the same time in which to challenge panel members for cause. A decision on challenges for cause shall be made by agreement or by the judicial referee. If there are disqualifications or challenges for cause, the clerk shall appoint additional panel members as required. Thereafter, from the list of five attorneys and five physicians, the parties shall agree on one attorney and one physician to serve on the hearing panel. If the parties are unable to agree, each side shall then strike names alternately from the attorneys' list and from the physicians' list separately, with the claimant striking first, until each side has stricken two names from each list. The remaining attorney and physician shall serve on the hearing panel.

(4) *The clerk shall, with the advise and cooperation of the parties and their counsel, fix a date, time and place for a hearing on the claim before the hearing panel, provided, however, that the hearing shall be held within 120 days of the date the claim is filed with the clerk, unless for good cause shown upon order of the judicial referee, such time is extended. Such extension shall not exceed six months from the date the claim is filed. If no hearing is held on the merits within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate and the parties may proceed in accordance with law.*

(5) *The filing of the claim shall toll any applicable statute of limitations, and such statute of limitations shall remain tolled until the hearing panel issues its written decision, or the jurisdiction of the panel is otherwise terminated. In any event, a party shall have 60 days from the date the decision of the hearing panel is mailed to the parties or the date on which the jurisdiction of the panel is otherwise terminated in which to file a complaint in circuit court.*

(6) *All parties shall be allowed to utilize any discovery procedure provided for by the Florida Rules of Civil Procedure. Any motion for relief arising out of the use of such discovery procedures shall be decided by the judicial referee. The judicial referee may in his discretion make reasonable limitations on the extent of discovery.*

(7) *The claim shall be submitted to the hearing panel under such procedural rules as may be established by the Supreme Court, provided that strict adherence to the rules of procedure and evidence applicable in civil cases shall not be required. Witnesses may be called, all testimony shall be under oath, testimony may be taken either orally before the panel or by deposition, copies of records, x-rays and other documents may be produced and considered by the panel and the right to subpoena witnesses and evidence shall obtain as in all other proceedings in the circuit court. The right of cross-examination shall obtain as to all witnesses who testify in person. Both parties shall be entitled, individually and through counsel, to make opening and closing statements. No transcript or record of the proceedings shall be required, but any party may have the proceedings transcribed or recorded. The judge presiding at the hearing shall not preside at any trial arising out of the claim or hear any application in the case not connected with the hearing itself. No other hearing panel member*

shall participate in a trial arising out of the claim either as counsel or witness.

(8) *Within 30 days after the completion of any hearing, the hearing panel shall file a written decision with the clerk of the court who shall thereupon mail copies to all parties concerned and their counsel. The panel shall decide the issue of liability and shall state its conclusion in substantially the following language: "We find the defendant was actionably negligent in his care and/or treatment of the patient and we, therefore, find for the plaintiff"; or "We find the defendant was not actionably negligent in his care and/or treatment of the patient and we, therefore, find for the defendant". The decision shall be signed by all members of the hearing panel; however, any member of the panel may file a written concurring or dissenting opinion.*

(9) *After a finding of liability, if the adverse parties agree, the panel may continue mediation for the purpose of assisting the parties in reaching a settlement. In such event, the panel shall also make a recommendation as to a reasonable range of damages, if any, which should be awarded in the case. The recommendation as to damages shall include in simple, concise terms some breakdown as to which portion of the damages recommended are attributable to past and estimated future health or custodial care expenses attributable to the alleged malpractice or any of the other elements of damage enumerated in s. 768.21, Florida Statutes, for wrongful death or recognized by the Florida Standard Jury Instructions as elements of damages in injuries due to negligence. However, the panel shall not have the right to determine punitive damages. Any findings of damages shall not be admissible in evidence in a subsequent trial.*

(10) In the event any party rejects the decision of the hearing panel, the claimant may institute litigation based upon the claim in the appropriate court. Furthermore, in any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, insurance coverage or joinder in the suit of the insurer as a co-defendant.

(11) The conclusion of the hearing panel on the issue of liability may be admitted into evidence in any subsequent trial. However, no specific findings of fact shall be admitted into evidence at trial. Parties may, in the opening statement or argument to the court or jury, comment on the panel's conclusion in the same manner as any other evidence introduced at trial. If there is a dissenting opinion, the numerical vote of the panel shall also be admissible. Panel members may not be called to testify as to the merits of the case. The jury shall be instructed that the conclusion of the hearing panel shall not be binding but shall be accorded such weight as they choose to ascribe to it.

(12) No member of the hearing panel shall be liable in damages for libel, slander or defamation of character of any party to the mediation proceedings for any action taken or recommendation made by such member acting within his official capacity as a member of the hearing panel.

Section 6. The provisions of section 5 of this act shall not be applicable to any case in which formal suit has been instituted prior to the effective date of that section, which shall be July 1, 1975.

Section 7. Subsection (4) of section 95.11, Florida Statutes, 1974 Supplement, is amended to read:

95.11 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(4) WITHIN TWO YEARS.—

(a) An action for professional malpractice, *other than medical malpractice,* whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; provided, however, that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

(b) An action for medical malpractice shall be commenced within two years from the time the incident occurred giving rise to the action, or within two years from the time the incident is discovered, or should have been discovered with the exercise of due diligence, provided, however, that in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued. An action for medical malpractice is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care. The limitation of actions within this subsection shall be limited to the health care provider and persons in privity with the provider of health care. In those actions covered by this paragraph where it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury within the four-year period, the period of limitations is extended forward two years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed seven years from the date the incident giving rise to the injury occurred.

(c)(b) An action to recover wages or overtime or damages or penalties concerning payment of wages and overtime.

(d)(c) An action for wrongful death.

Section 8. Section 768.042, Florida Statutes, is created to read:

768.042 Damages.—In any action brought in the circuit court to recover damages for personal injury or wrongful death, the amount of general damages shall not be stated in the complaint, but the amount of special damages, if any, may be specifically pleaded and the requisite jurisdictional amount established for filing in any court of competent jurisdiction.

Section 9. The provisions of section 8 of this act shall not apply to any complaint filed prior to the effective date of this act.

Section 10. Section 725.01, Florida Statutes, is amended to read:

725.01 Promise to pay another's debt, etc.—No action shall be brought whereby to charge any executor or administrator upon any special promise to answer or pay any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements or hereditaments, or of any uncertain interest in or concerning them, or for any lease thereof for a period longer than one year, or upon any agreement that is not to be performed within the space of one year from the making thereof, *or whereby to charge any health care provider upon any guarantee, warranty or assurance as to the results of any medical, surgical or diagnostic procedure, performed by any physician licensed under chapter 458, Florida Statutes, osteopath licensed under chapter 459, Florida Statutes, chiropractor licensed under chapter 460, Florida Statutes, podiatrist licensed under chapter 461, Florida Statutes, or dentist licensed under chapter 466, Florida Statutes,* unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.

Section 11. Section 768.132, Florida Statutes, is created to read:

768.132 Florida medical consent laws.—

(1) This section shall be known and cited as the "Florida Medical Consent Law".

(2) In any medical treatment activity not covered by s. 768.13, Florida Statutes, entitled "the Good Samaritan Act", this act shall govern.

(3) No recovery shall be allowed in any court in this state against any physician licensed under chapter 458, Florida Statutes, osteopath licensed under chapter 459, Florida Statutes, chiropractor licensed under chapter 460, Florida Statutes, podiatrist licensed under chapter 461, Florida Statutes, or dentist licensed under chapter 466, Florida Statutes, in an action brought for treating, examining, or operating on a patient without his informed consent where:

(a) The action of the physician, osteopath, chiropractor, podiatrist, or dentist in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among members of the medical profes-

sion with similar training and experience in the same or similar medical community; and

(b) A reasonable individual from the information provided by the physician, osteopath, chiropractor, podiatrist, or dentist under the circumstances, would have a general understanding of the procedure and medically acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other physicians, osteopaths, chiropractors, podiatrists, or dentists in the same or similar community who perform similar treatments or procedures; or

(c) The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he been advised by the physician, osteopath, chiropractor, podiatrist, or dentist in accordance with the provisions of paragraphs (a) and (b) of this section.

(4)(a) A consent which is evidenced in writing and meets the requirements of subsection (3), shall, if validly signed by the patient or another authorized person, be conclusively presumed to be valid consent. This presumption may be rebutted if there was a fraudulent misrepresentation of a material fact in obtaining the signature.

(b) A valid signature is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent.

Section 12. Subsection (5) of s. 458.1201, Florida Statutes, is renumbered as subsection (6), and a new subsection (5) is added to said section; paragraph (m) of subsection (1) of said section is amended and paragraphs (o) and (p) are added to said subsection; paragraphs (c) and (d) are added to subsection (2) of said section; paragraph (a) of subsection (3) of said section is amended to read:

458.1201 Denial, suspension, revocation of license; disciplinary powers.—

(1) The board shall have authority to deny an application for a license or to discipline a physician licensed under this chapter or any antecedent law who, after hearing has been adjudged unqualified or guilty of any of the following:

(m) Being guilty of immoral or unprofessional conduct, *incompetence, negligence, or willful misconduct.* Unprofessional conduct shall include any departure from, or the failure to conform to, the minimal standards of acceptable and prevailing medical practice *in his area of expertise as determined by the board*, in which proceeding actual injury to a patient need not be established; or the committing by a physician of any act contrary to honesty, justice, or good morals, *when* whether the same is committed in the course of his practice or otherwise, and whether committed within or without this state;

(o) Being found liable for medical malpractice or any personal injury resulting from an act or omission committed or omitted by a person in his capacity as a physician licensed pursuant to this chapter.

(p) Being removed or suspended or having disciplinary action taken by his peers within any professional medical association, society, professional standards review organization established pursuant to section 249F of Public Law 92-603, or similarly constituted professional body, whether or not such association, society, organization, or body is local, regional, state, national, or international in scope, or by being disciplined by a licensed hospital or medical staff of said hospital for immoral or unprofessional conduct or willful misconduct or negligence by a person in his capacity as a physician licensed pursuant to this

chapter. Any body taking action as set forth in this paragraph shall report such action to the board within 30 days of its occurrence or be subject to a fine assessed by the board in an amount not exceeding $500.

(2)(c) In any proceeding under subsection (1) of this section the board may appoint one or more licensed physicians to act for the board in investigating the conduct or competence of a physician.

(d) There shall be no liability on the part of, and no cause of action of any nature shall arise against the board, its agents, its employees, or any organization or its members identified in paragraph (p) of subsection (1) of this section, for any statements made by them in any reports or communications concerning an investigation of the conduct or competence of a physician.

(3)(a) When the board finds any person unqualified or guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following:

1. Deny his application for a license;

2. Permanently withhold issuance of a license;

3. Administer a public or private reprimand;

4. Suspend or limit or restrict his license to practice medicine for a period of *up to* five years;

5. Revoke *indefinitely* his license to practice medicine;

6. Require him to submit to the care, counseling, or treatment of physicians designated by the board;

7. *Require him to participate in a program of continuing education prescribed by the board;*

8. Require him to practice under the direction of a physician in a public institution, public or private health care program, or private practice for a period of time specified by the board.

(5) The board shall report to the President of the Senate and the Speaker of the House of Representatives, on February 1 of each year beginning February 1, 1976, the status of the actions taken by the board in carrying out its responsibilities assigned to it under this section.

(6) (5) The provisions of this section are enacted in the public welfare and shall be liberally construed so as to advance the remedy.

Section 13. Section 395.065, Florida Statutes, is created to read:

395.065 Hospital disciplinary powers.—

(1) The medical staff of any hospital licensed pursuant to chapter 395, Florida Statutes, is authorized to suspend, deny, revoke, or curtail the staff privileges of any staff member for good cause, which shall include, but not be limited to:

(a) Incompetence;

(b) Negligence;

(c) Being found an habitual user of intoxicants or drugs to the extent that the physician is deemed dangerous to himself or others; or

(d) Being found liable by a court of competent jurisdiction for medical malpractice.

Provided, however, that the procedures for such actions shall comply with the standards outlined by the Joint Commission of Accreditation of Hospitals and the Principles of Participation in the Federal Health Insurance Program for the Aged.

(2) *There shall be no liability on the part of and no cause of action of any nature shall arise against any hospital, hospital medical staff or hospital disciplinary body, its agents or employees, for any action taken in good faith and without malice in carrying out the provisions of this act.*

Section 14. Subsection (8) of s. 627.351, Florida Statutes, is created to read:

627.351 Insurance risk apportionment plan.—

(8)(a) *The Department of Insurance shall, after consultation with insurers as set forth in paragraph (b), adopt a temporary joint underwriting plan as set forth in paragraph (d).*

(b) *Entities licensed to issue casualty insurance as defined in s. 624.605(1)(b), (j) and (p), Florida Statutes, and self-insurers authorized to issue medical malpractice insurance under s. 627.355, Florida Statutes, shall participate in the plan and shall be members of the Temporary Joint Underwriting Association.*

(c) *The joint underwriting association shall operate subject to the supervision and approval of a board of governors consisting of representatives of five of the insurers participating in the joint underwriting association, an attorney to be named by the Florida Bar, a physician to be named by the Florida Medical Association, a hospital representative to be named by the Florida Hospital Association, and the Insurance Commissioner or his designated representative employed by the Department of Insurance. The Insurance Commissioner or his representative shall be the chairman of the board.*

(d) *The temporary joint underwriting plan shall function for a period not exceeding three years from the*

date of its adoption by the Department of Insurance and if still in existence at the end of such three-year period, it shall automatically terminate. The plan shall provide professional liability or malpractice coverage in a standard policy form for all hospitals licensed under chapter 395, Florida Statutes, physicians licensed under chapter 458, Florida Statutes, osteopaths licensed under chapter 459, Florida Statutes, podiatrists licensed under chapter 461, Florida Statutes, dentists licensed under chapter 466, Florida Statutes, nurses licensed under chapter 464, Florida Statutes, and nursing homes licensed under chapter 400, Florida Statutes, or professional associations of such persons. The plan shall include, but not be limited to, the following:

1. Rules for the classification of risks and rates which reflect past and prospective loss and expense experience in different areas of practice and in different geographical areas.

2. A rating plan which reasonably recognizes the prior claims experience of insureds.

3. Provisions as to rates for insureds who are retired, semi-retired, the estate of a deceased insured, or part-time professionals.

4. Protection in an amount to be determined by the Insurance Commissioner and for those hospitals licensed under chapter 395, Florida Statutes, whose policies have been cancelled since April 1, 1975, that have not been able to otherwise secure coverage in the standard market shall provide continuous coverage at the limits available in the plan from the above date.

5. Rules to implement the orderly dissolution of the plan at its termination.

6. The Insurance Commissioner may, in his discretion, require that insurers participating in the joint underwriting association offer excess coverage.

(e) Premium contingency assessment.—

1. In the event an underwriting deficit exists at the end of any year the plan is in effect, each policyholder shall pay to the association a premium contingency assessment not to exceed one-third of the annual premium payment paid by such policyholder to the association. The association shall cancel the policy of any policyholder who fails to pay the premium contingency assessment.

2. Any deficit sustained under the plan shall first be recovered through the premium contingency assessment. Concurrently, the rates for insureds shall be adjusted for the next year so as to be actuarially sound.

3. If there be any remaining deficit under the plan after maximum collection of the premium contingency assessment, such deficit shall be recovered from the companies participating in the plan in the proportion that the net direct premiums of each such member written during the preceding calendar year bears to the aggregate net direct premiums written in this state by all members of the association. Premiums as used herein shall mean premiums for the lines of insurance defined in s. 624.605(1)(b), (j), and (p), Florida Statutes, including premiums for such coverage issued under package policies.

(f) The plan shall provide for one or more insurers able and willing to provide policy service through licensed resident agents and claims service on behalf of all other insurers participating in the plan.

(g) The Department of Insurance, prior to termination of the plan, shall determine whether a need reasonably

exists for continuing coverage for those who have been insured by the plan, as to claims solely for incidents which occurred during the existence of the plan. If such need is found, the Department of Insurance shall establish a plan for the purchase of such coverage for a reasonable time, prior to termination of the plan.

(h) All books, records, documents or audits relating to the joint underwriting association or its operation shall be open to public inspection.

Section 15. Section 627.353, Florida Statutes, is created to read:

627.353 Limitation of liability and patient's compensation fund.—

(1) LIMITATION OF LIABILITY.—

(a) All hospitals licensed under chapter 395, Florida Statutes, shall unless exempted under paragraph (c) of this section, and all physicians and physician's assistants licensed under chapter 458, Florida Statutes, osteopaths licensed under chapter 459, Florida Statutes, and podiatrists licensed under chapter 461, Florida Statutes, may, pay the yearly assessment into the patient's compensation fund pursuant to subsection (2) of this section prior to practicing during any year.

(b) Said licensed hospital, physician, physician's assistant, osteopath, or podiatrist shall not be liable for an amount in excess of $100,000 for claims arising out of the rendering of medical care or services in this state if at the time the incident occurred giving rise to the cause of the claim, the hospital, physician, physician's assistant, osteopath or podiatrist:

1. had posted bond in the amount of $100,000, proved financial responsibility in the amount of $100,000 to the

satisfaction of the Insurance Commissioner through the establishment of an appropriate escrow account, obtained medical malpractice insurance in the amount of $100,000 or more from private insurers or the joint underwriting association established under section 14 of this act, or obtained self-insurance as provided in s. 627.355, Florida Statutes, providing coverage in an amount of $100,000 or more, and

2. Had paid for the year in which the incident occurred for which the claim was filed the fee required pursuant to subsection (2) of this section.

(c) Any hospital that can meet one of the following provisions demonstrating financial responsibility to meet claims arising out of the rendering of medical care or services in this state shall not be required to participate in the fund:

1. Post bond in an amount equivalent to $10,000 for each hospital bed in said hospital not to exceed $2,500,000; or

2. Prove financial responsibility in an amount equivalent to $10,000 for each hospital bed in said hospital not to exceed $2,500,000 to the satisfaction of the Insurance Commissioner through the establishment of an appropriate escrow account; or

3. Obtain professional liability coverage in an amount equivalent to $10,000 or more for each bed in said hospital from a private insurer, from the joint underwriting association established under section 14 of this act, or through a plan of self-insurance as provided in s. 627.355, Florida Statutes; provided, however, no hospital shall be required to obtain such coverage in an amount exceeding $2,500,000.

(d) Any licensed hospital, physician, physician's assistant, osteopath, or podiatrist who does not meet the

provisions of paragraph (b) of this subsection shall be subject to liability under law without regard to the provisions of this section.

(2) PATIENT'S COMPENSATION FUND.—

(a) The fund.—There is created a "Florida Patient's Compensation Fund" hereinafter referred to as the "Fund", for the purpose of paying that portion of any medical malpractice claim which is in excess of $100,000 as set forth in paragraph (b) of subsection (1) of this section. The Fund shall be liable only for payment of claims against hospitals, physicians, physician's assistants, osteopaths and podiatrists in compliance with the provisions of paragraph (b) of subsection (1) of this section, and reasonable and necessary expenses incurred and payment of claims and fund administrative expenses.

(b) Fund administration and operation.—Management of the fund shall be vested with the joint underwriting association authorized by section 14 of this act, hereinafter referred to as the JUA. The JUA shall operate subject to the supervision and approval of a board of governors consisting of representatives of five of the insurers participating in the JUA, an attorney to be named by the Florida Bar, a physician to be named by the Florida Medical Association, a hospital representative to be named by the Florida Hospital Association, and the Insurance Commissioner or his designated representative employed by the Department of Insurance. The Insurance Commissioner or his representative shall be the chairman of the board. In the event of termination or dissolution of said JUA with respect to providing professional liability or malpractice insurance, the JUA shall continue to operate for the purpose of fund management as provided in this subsection.

(c) *Fees and assessments.—Annually, each licensed hospital, physician, physician's assistant, osteopath or podiatrist as set forth in subsection (1) electing to comply with paragraph (b) of subsection (1) of this section shall pay the fees established under this act for deposit into the fund, which shall be remitted for deposit in a manner prescribed by the Insurance Commissioner. The coverage provided by the fund shall begin July 1, 1975 and run thereafter on a fiscal year basis. For the first year of operation each participating licensed hospital, physician, physician's assistant, osteopath, or podiatrist covered under the fund shall pay a fee for deposit into the fund in the amount of $1,000 for any individual and $300 per bed for any hospital. The fee charged after the first year of operation shall consist of a base fee of $500 for any individual and $300 per bed for any hospital. In addition, after the first year of operation additional fees shall be assessed based on the following considerations:*

1. Past and prospective loss and expense experience in different types of practice and in different geographical areas within the state.

2. The prior claims experience of persons or hospitals covered under the fund.

3. Risk factors for persons who are retired, semi-retired or part-time professionals.

Said base fees may be adjusted downward for any fiscal year in which a lesser amount would be adequate and in which the additional fee would not be necessary to maintain the solvency of the fund. Said additional fee shall be based on not more than two geographical areas with three categories of practice and with a fourth category which contemplates individual risk rating for hospitals. The fund shall be maintained at not more than $25,000,000.

Fees shall be set by the Insurance Commissioner after consultation with the JUA. Nothing contained herein shall be construed as imposing liability for payment of any part of a fund deficit on the JUA or its member insurers. If the JUA determines that the amount of money in the fund is not sufficient to satisfy the claims made against the fund in a given fiscal year, the JUA shall certify the amount of the projected insufficiency to the Insurance Commissioner and shall request the Insurance Commissioner to levy a deficit assessment against all participants in the fund for that fiscal year. The Insurance Commissioner shall levy such deficit assessment against such participants in amounts that fairly reflect the classifications prescribed above and which are sufficient to obtain the money necessary to meet all claims for said fiscal year.

(d) *Fund accounting and audit.—*

1. Monies shall be withdrawn from the fund only upon vouchers approved by the JUA as authorized by the Board of Governors.

2. All books, records, and audits of the fund shall be open for reasonable inspection to the general public.

3. Persons authorized to receive deposits, withdraw, issue vouchers or otherwise disburse any fund monies shall post a blanket fidelity bond in an amount reasonably sufficient to protect fund assets. The cost of such bond shall be paid from the fund.

4. Annually, the JUA shall furnish an audited financial report to all fund participants and to the Department of Insurance and to the Joint Legislative Auditing Committee. The report shall be prepared in accordance with accepted accounting procedures and shall include income and such other information as may be required by the

Department of Insurance or the Joint Legislative Auditing Committee.

5. Monies held in the fund shall be invested in short-term interest bearing investments by the JUA as administrator, provided that in no case shall said moneys be invested in the stock of any insurer participating in the JUA or in the parent company or company owning a controlling interest of said insurer. All income derived from such investments shall be credited to the fund.

6. Any person or hospital participating in the fund may withdraw from such participation at the end of any fiscal year; however, such person or hospital shall remain subject to any deficit assessment pertaining to any year in which such person or hospital participated in the fund.

(e) Claims procedures.—

1. Any person may file an action for damages arising out of the rendering of medical care or services against a person covered under the fund provided that the person filing the claim shall not recover against the fund any portion of a judgment for damages arising out of the rendering of medical care or services against a person covered under the fund unless the fund was named as a defendant in the suit. If after reviewing the facts upon which the claim is based it appears that the claim will exceed $100,000, the fund shall appear and actively defend itself when named as a defendant in the suit. In so defending, the fund shall retain counsel and pay out of the fund attorney's fees and expenses including court costs incurred in defending the fund. The attorney or law firm retained to defend the fund shall not be retained or employed by the JUA to perform legal services for the JUA other than those directly connected with the fund. The fund is authorized to negotiate with any claim-

ants having a judgment exceeding $500,000 to reach an agreement as to the manner in which that portion of the judgment exceeding $500,000 is to be paid. Any judgment affecting the fund may be appealed under the Florida Appellate Rules of Procedure as with any defendant.

2. It shall be the responsibility of the insurer or self-insurer providing insurance or self-insurance for a hospital, physician, physician's assistant, osteopath or podiatrist who is also covered by the fund to provide an adequate defense on any claim filed that potentially affects the fund with respect to such insurance contract or self-insurance contract. The insurer shall act in a fiduciary relationship with respect to any claim affecting the fund. No settlement exceeding $100,000, or any other amount which could require payment by the fund, shall be agreed to unless approved by the JUA.

3. A person who has recovered a final judgment or a settlement approved by the JUA against a hospital, physician, physician's assistant, osteopath or podiatrist, who is covered by the fund may file a claim with the JUA to recover that portion of such judgment or settlement which is in excess of $100,000 as set forth in paragraph (b) of subsection (1) of this section. In the event the fund incurs liability exceeding $1,000,000 to any person under a single occurrence the fund shall pay not more than $1,000,000 per year until the claim has been paid in full.

4. Claims filed against the fund shall be paid in the order received within 90 days after filing unless appealed by the fund. If the fund does not have enough money to pay all of the claims, claims received after the funds are exhausted shall be immediately payable the following year in the order in which they were received.

5. If a person or hospital participating in the fund has coverage in excess of $100,000, he shall be liable for losses up to the amount of his coverage, and he shall receive an appropriate reduction of his assessment for the fund. Such reduction shall be granted only after that person has proved to the satisfaction of the JUA that he has such coverage.

Section 16. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 17. This act shall take effect upon becoming law.

Approved by the Governor May 20, 1975.

Filed in Office Secretary of State May 20, 1975.

APPENDIX C

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA.

CIVIL ACTION NO. 75-2466-CA-01-F

NELLIE MAE SPARKMAN,
Plaintiff,

vs.

JAMES E. CARTER, and EMPLOYERS SURPLUS LINES INSURANCE COMPANY,
Defendants.

AMENDED ORDER

The Order rendered by this Court on August 20, 1975, is hereby vacated and the following Order is substituted in lieu thereof:

ORDER

This cause came on to be heard this 8th day of August 1975, on Defendant's Motion to Dismiss, Defendants appearing specially by HESKIN A. WHITTAKER, ESQ., and the Plaintiff being represented by WALTER STOCKMAN, ESQ., and IRVING GRASS, ESQ.; and the Court, having heard argument of counsel for the parties and being otherwise advised in the premises,

IT IS FOUND, that Florida Statute 768.133 created by §5 of Chap. 75-9 of the Laws of Florida (1975), and §6 of Chap. 75-9, as promulgated by the First Regular Session of the 4th Legislature of Florida, is unconstitutional;

It is further found that:

a. Such newly created statute violates Amendments 5 and 14 of the United States Constitution, and Article 1, §§2 and 9 of the Florida Constitution, in that said statute denies to the Plaintiff her basic rights and the constitutional guarantees of said Constitutions of due process of the law and the equal protection of the laws; that subsections (2), (10) and (11) of said statute was special class legislation designed solely for the benefit of defendant physicians in suits for their malpractice based on their negligence, by requiring Plaintiff to first submit to mediation before filing a suit for damages in a court of law, while at the same time the defendant physician is allowed the option of submitting his defense to such claim by not being required to plead to such claim;

b. That said statute expressly and illegally controverts the 1968 holding of the Florida Supreme Court in the case of Shingleton vs. Bussey, 223 So. 2d 713, thereby depriving Plaintiff of the equal protection of the law in that said statute deprives this Plaintiff of her right in any civil medical malpractice action to refer to insurance, insurance coverage or joinder in such suit of the insurer as a co-defendant on a trial on the merits, while such right is permitted to other Plaintiffs in civil suits based on the negligence of others;

c. That said statute violates the provisions of Article 5, §§2 and 13 of the Florida Constitution in that the legislature in creating said statute infringed on the constitutional right of the Supreme Court to regulate practice and procedure in the courts of Florida; and that said statute requires Circuit Judges to devote a part of their full time as a judicial referee on the mediation panel created by said statute.

And the parties having orally agreed before this Court to this Court's suggestion that all questions of law posed by the issues created by this action, and argument of counsel and the finding of this Court, be certified to the Supreme Court of Florida for answer and instruction, it is therefore,

ORDERED THAT:

1. Defendants' Motion to Dismiss be, and the same is hereby denied.

2. The parties prepare, pursuant to F.A.R. 4.6, certification by this Court to the Supreme Court of Florida, the following questions:

a. Does Florida statute 768.133 violate Amendments 5 and 14 of the United States Constitution?

b. Does Florida statute 768.133 violate Article 1, §§ 2, 9 and 21; and Article 5, §§2 and 13 of the Florida Constitution?

3. The costs of filing the certified questions shall be equally divided between the parties.

ORDERED at Titusville, Brevard County, Florida, this 10th day of September, 1975.

/s/ Volie A. Williams, Jr.
Circuit Judge

I HEREBY CERTIFY that copies hereof have been furnished by mail to STOCKMAN & GRASS, Attorneys for Plaintiff, P. O. Box 855, Cocoa Beach, Florida 32931, and to WHITTAKER, PYLE & STUMP, Attorneys for Defendants, P. O. Box 6126-C, Orlando, Florida 32803, this 10th day of September, 1975.

/s/ Roberta O. Gregory
Secretary to the Judge

APPENDIX D

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA.

CIVIL ACTION NO. 75-2466-CA-01-F

NELLIE MAE SPARKMAN,
Plaintiff,

vs.

JAMES E. CARTER and EMPLOYERS SURPLUS LINES INSURANCE COMPANY,
Defendants.

CERTIFICATE

QUESTIONS CERTIFIED FROM CIRCUIT COURT

Pursuant to F.A.R. 4.6, and Article 5, §3(a)(1) of the Florida Constitution, the undersigned sua sponte, a Judge of this Court, certifies the questions below, to the Supreme Court of Florida, for instructions, and says:

STATEMENT OF FACTS

1. On July 18, 1975, Plaintiff filed suit in this Court against Defendants, JAMES E. CARTER, and ARGONAUT INSURANCE COMPANY, said suit against Defendant CARTER being based on the alleged negligence of said defendant in treating Plaintiff for a fracture of the proximal head of the fifth metatarsal bone of her right foot. A copy of Plaintiff's Complaint is hereto annexed as Exhibit 1.

2. On July 31, 1975, Defendant CARTER moved this Court to dismiss said suit on the grounds that this Court lacked jurisdiction of the subject matter of the suit and of Defendant ARGONAUT, alleging inter alia, that Plaintiff had not complied with §§5 and 6 of Chap. 75-9, Fl. Sts. (1975) entitled "Medical Malpractice Reform Act", which became effective on July 1, 1975 creating new §768.-133 of the Florida Statutes, which statute mandatorily requires cases such as the instant case to be filed pursuant to such newly created statute as a Medical Liability Mediation Claim, to be heard first before a liability mediation panel whose presiding member and judicial referee shall be a circuit judge; that Plaintiff had not complied with such newly created statute by first filing her claim thereunder. Defendant CARTER further indicated his special appearance to contest the jurisdiction of this court over Defendant ARGONAUT, by alleging that Defendant CARTER's insurer was in fact EMPLOYERS SURPLUS LINES INSURANCE COMPANY. A copy of Defendant's Motion to Dismiss is hereto annexed as Exhibit 2.

3. On August 8, 1975, Defendant's Motion to Dismiss was heard before this Court. Plaintiff opposed Defendant's Motion on the grounds that the newly created statute was unconstitutional under Amendments 5 and 14 of the United States Constitution; Article 1, §§2, 9 and 21 of the Florida Constitution, and Article 5, §§2 and 13 of the Florida Constitution specifying that the newly created statute deprived Plaintiff of the due process of the laws, and of the equal protection of the laws, and that the newly created statute expressly and illegally controverts the 1968 holding of the Florida Supreme Court in the case of Shingleton v. Bussey, 223 So. 2d 713. It was Plaintiff's position that:

a. The new statute, making it *mandatory for a Plaintiff to first submit to mediation* before filing a suit for relief in a court of law, while at the same time *a defendant physician was allowed the option of submitting his defense to such* claim to mediation (§5, Chap. 75-9, Laws of 1975, 4th Legislature of Florida; Fl. St. 768.133(2) (emphasis supplied), was a denial of due process and the equal protection of the laws under the United States and Florida Constitutions.

b. The requirement of the new statute that in any civil medical malpractice action, the trial on the merits shall be conducted without reference to insurance, insurance coverage or joinder in the suit of the insurer as a co-defendant, was likewise unconstitutional under the above cited constitutional references.

c. The new statute did not treat Plaintiff and Defendant herein equally thereby denying Plaintiff her basic rights under Article 1, §2 of the Florida Constitution.

d. The new statute restrained Plaintiff from timely access to the Courts thereby violating Article 1, §21 of the Florida Constitution.

4. This Court agreed with and ruled in favor of the Plaintiff, and found in addition to the above that the newly created statute violated:

a. Article 5, §13 of the Florida Constitution by requiring circuit judges to devote a portion of their time by being named as a judicial referee of a medication panel (Fl. St. 768.133(1)).

b. Article 5, §2 of the Florida Constitution in that the legislature, by creating rules of pleading in the new statute (Fl. St. 768.133(2)), had infringed upon the power

of the Supreme Court. A copy of this Court's Order is hereto annexed as Exhibit 3.

c. The 5th and 14th Amendments to the United States Constitution, in that said new statute was special class action legislation, and thereby a denial of due process of and equal protection of the laws to a plaintiff (Fl. St. 768.133 (2), (10) and (11)).

5. With respect to Defendant's special appearance in connection with Defendant, ARGONAUT, Plaintiff, pursuant to Fl. RCP 1.420(a)(1), and Fl. RCP 1.250(b), has dropped Defendant, ARGONAUT, and has amended her Complaint pursuant to Fl. RCP 1.190(a). A copy of said amended Complaint is hereto annexed as Exhibit 4. Although service of process on Defendant EMPLOYERS SURPLUS has not yet been perfected, the parties by oral stipulation, through their respective counsel, to this Court, have agreed to permit the questions following to be certified for answer and instruction.

QUESTIONS OF LAW TO BE ANSWERED

Decision in this case, having been rendered on said above latter date, the following questions were passed on by the decision:

A. Does Florida Statute 768.133 violate Amendments 5 and 14 of the United States Constitution?

B. Does Florida Statute 768.133 violate Article 1, §2 of the Florida Constitution?

C. Does Florida Statute 768.133 violate Article 1, §9 of the Florida Constitution?

D. Does Florida Statute 768.133 violate Article 1, §21 of the Florida Constitution?

E. Does Florida Statute 768.133 violate Article 5, §13 of the Florida Constitution?

F. Does Florida Statute 768.133 violate Article 5, §2 of the Florida Constitution?

Respectfully submitted,

/s/ Volie A. Williams, Jr.
Circuit Judge

WITNESS, the Honorable VOLIE A. WILLIAMS, JR., Circuit Judge, and Seal of this Court, this 10 day of September, 1975.

/s/ Curtis R. Barnes
Clerk, 18th Judicial Circuit

(Seal of Court)

I HEREBY CERTIFY that copies hereof have been furnished by mail to STOCKMAN & GRASS, Attorneys for Plaintiff, P. O. Box 855, Cocoa Beach, Florida 32931, and to WHITTAKER, PYLE & STUMP, Attorneys for Defendants, P. O. Box 6126-C, Orlando, Florida 32803, this 10 day of September, 1975.

/s/ E. M. McCoskey
Clerk of the Court, Deputy Clerk

In The
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-598

NELLIE MAE SPARKMAN,

Petitioner,

vs.

JAMES E. CARTER and EMPLOYERS SURPLUS LINES INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Heskin A. Whittaker
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Jacksonville, Florida 32202

Attorneys for Respondent

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In The
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JAMES E. CARTER and EMPLOYERS SURPLUS LINES INSURANCE COMPANY,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTIONS PRESENTED

POINT I

DO THE MEDIATION PANEL PROVISIONS OF FLORIDA STATUTE §768.133, APPLICABLE TO MEDICAL MALPRACTICE ACTIONS, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

POINT II

DOES FLORIDA STATUTE §768.133 VIOLATE THE DUE PROCESS PROVISIONS OF AMEND-

MENTS V AND XIV OF THE UNITED STATES CONSTITUTION?

POINT III

DOES FLORIDA STATUTE §768.133 VIOLATE PLAINTIFF'S RIGHT TO A TRIAL BY A JURY OF HER PEERS?

PETITIONER'S FAILURE TO SHOW REASONS FOR GRANTING CERTIORARI

The rules of this Court, specifically Rule 19.1, Rules of the Supreme Court, expressly state that review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. That same rule further provides that situations in which this Court's discretion will be exercised in favor of granting the petition are exemplified by state court decisions in which a federal question of substance has been determined in a manner probably not in accord with the applicable decisions of this Court or where a federal court of appeals has rendered a decision in conflict with that of another federal court of appeals in the same matter. Petitioner in the instant cause has not shown the existence of any of the grounds specified in Rule 19, nor any other compelling reason for this Court to exercise its discretion in Petitioner's favor. Rather, Petitioner relies on a purported conflict between decisions of the highest courts of two different states. It is accordingly submitted that the petition should be denied.

Petitioner attempts to assert a conflict between the decision of the Supreme Court of Florida in the instant cause and that of the Supreme Court of Illinois in *Wright v. Central*

DuPage Hospital Assn., 347 N.E.2d 736 (Ill. 1976), in which that court declared the Illinois malpractice act to be unconstitutional in various regards. Although the Supreme Court of Illinois in that decision held unconstitutional provisions of an Illinois statute providing for a medical mediation panel in malpractice actions, it must be emphasized that the basis of the decision in that regard was that the statute there in question violated the provisions of Article VI, §1 and §9, of Illinois' state constitution, for the reason that the Illinois statute there in question vested essentially judicial functions in nonjudicial personnel. The Illinois statute permitted the nonjudicial members of the medical review panel to exercise a judicial function by permitting the physician and lawyer members of the medical review panel to render conclusions of law over the dissent of the Circuit Judge member of the panel.

No attack on this basis is made in the instant proceedings, and indeed, no such attack could have been successfully maintained. The statute presently being considered expressly provides that the Circuit Judge sitting on the panel as judicial referee and presiding officer shall rule on limitations of the extent of discovery (Florida Statute §768.133(6)), and shall determine the type of medical specialist who should be on the panel in the event the parties do not agree. Florida Statute §768.133(2). The act further provides that the Supreme Court of Florida shall adopt procedural rules for the medical liability mediation panel, a provision which has been implemented by the Supreme Court of Florida in *In Re Transition Rule 21*, 316 So.2d 38 (Fla. 1975). Transition Rule 21(h), promulgated in that decision, expressly states that the judicial referee shall have the exclusive authority to rule on all matters of law and on the admissibility of relevant evidence as may be adduced by the parties, 316 So.2d at 39.. Accord-

ingly, the basis upon which the Illinois act was held to be unconstitutional is totally inapplicable to the Florida statute here in question.

Petitioner asserts that the Illinois act was held unconstitutional on the basis that it violated the equal protection and due process guarantees of the United States Constitution. However, Petitioner overlooks the fact that the Illinois court's statement as to these issues was merely dicta, the court having previously held the medical review panel provisions of the statute unconstitutional on state constitutional grounds before reaching these issues. Indeed, an examination of the decision reveals that the equal protection and due process arguments advanced in that cause were directed not to that statute's mediation panel provisions, but rather to a provision of the Illinois statute--not found in the Florida statute--limiting the amount of recovery in any medical malpractice action to $500,000. Thus, even if conflict between the decisions of the courts of two states is a basis for granting a petition for certiorari, the Illinois case relied upon by Petitioner simply is not in conflict with the decision of the Supreme Court of Florida.

The alternative basis asserted by Petitioner as a reason for this Court to grant certiorari in the instant cause is a plea that if the statute in question is not stricken down, it will establish a precedent for legislatures in other states to rely upon in enacting similar legislation. This, we submit, is clearly not a compelling reason for this Court to exercise its discretion in favor of granting the petition. Exactly the same argument could be made by any other petitioner seeking review of any decision of any state's highest court of appeals in which the constitutional validity of any statute was upheld. If the mere possibility that a statute might be used as a

draftsman's model by other legislatures after being held constitutionally valid were deemed a compelling reason for this Court to exercise its discretion in favor of granting a petition for certiorari, this Court would quickly find itself inundated with petitions for certiorari seeking review of every decision in which any state statute was upheld against constitutional assault. Clearly, this possibility of legislative copying does not present a compelling reason for this Court to exercise its discretion in favor of granting the petition within the meaning of Rule 19, Rules of the Supreme Court.

Accordingly, Respondents submit, Petitioner has shown no compelling reason for this Court to exercise its discretion in favor of granting the petition, and the petition should accordingly be denied.

ARGUMENT

POINT I

DO THE MEDIATION PANEL PROVISIONS OF FLORIDA STATUTE §768.133, APPLICABLE TO MEDICAL MALPRACTICE ACTIONS, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

Petitioner claims that the provisions of Florida Statute §768.133 do violence to the Equal Protection Clause in that the statute singles out a particular group of tortfeasors and gives them favorable treatment and, apparently in the alternative, that the mediation panel provisions apply only to certain classes of health care providers, rather than all health care providers. Apparently as another alternative, Petitioner asserts that the mediation panel procedure violates the Equal Protection Clause by discriminating against malpractice plaintiffs in favor of defendant health care providers.

Before dealing with the specifics of Petitioner's arguments, certain basic principles should be noted. Statutory classification does not, in and of itself, violate the Equal Protection Clause simply because the law affects some groups differently than others, and the constitutional demand of the Equal Protection Clause does not include a requirement that a statute necessarily apply equally to all persons. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Kotch v. Board of Riverport Pilot Commissioners*, 330 U.S. 552 *reh. den.* 331 U.S. 864 (1947). In order not to deny equal protection of the law, a statutory classification must rest upon some difference bearing a reasonable and just relationship to the statutory purpose, and a statutory classification having some reasonable basis does not offend the Equal Protection Clause even though it results in some inequality. *McLaughlin v. State of Florida*, 379 U.S. 184 (1964); *Morey v. Doud*, 354 U.S. 457 (1957). In passing on a contention that the Equal Protection Clause is contravened, the Court is not concerned with the soundness or wisdom of the distinctions drawn, it being enough that it was open to the state to believe them to be valid. *Safeway Stores, Inc. v. Oklahoma Retail Grocers' Assn., Inc.*, 360 U.S. 334 (1959). A statutory discrimination, in order to be sustained as not in violation of the Equal Protection Clause, must be based on differences reasonably related to the purposes of the act in which it is found. *Morey v. Doud*, 354 U.S. 457 (1957). In applying the Equal Protection Clause to social and economic legislation, the Court will give great latitude to the Legislature in making classifications, and the rough accommodations made by the government do not violate the Equal Protection Clause unless the lines drawn are hostile or invidious. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Norvell v. State of Illinois*, 373 U.S. 420 *reh. den.* 375 U.S. 870 (1963). The Fourteenth Amendment permits the states a wide scope of discretion in enacting laws

affecting some groups of citizens differently than others, and the constitutional safeguard is offended only if the classification rests on arbitrary grounds wholly irrelevant to the achievement of the state's objective. *McGowan v. State of Maryland*, 366 U.S. 420 (1961).

Nor does the Equal Protection Clause require the Legislature to make proposed remedies to perceived evils all-inclusive; rather it allows the Legislature to proceed on a step-by-step basis. Reform effected by a statute may proceed one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind, selecting one phase of one field and neglecting others, without amounting to a legislative classification in violation of the Equal Protection Clause. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, *reh. den.* 384 U.S. 967 (1966); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 *reh. den.* 349 U.S. 925 (1955); *Hughes v. Superior Court of California in and for Contra Costa County*, 339 U.S. 460 (1950).

Thus, the question presented to this Court under Petitioner's first argument is whether the procedural requirement of mediation panel proceedings prior to civil trial in medical malpractice actions, and not in other tort actions, represents an arbitrary and invidious discrimination against malpractice plaintiffs or, on the other hand, whether it has some rational basis related to the legislative objective in the enactment of the statute.

The legislative purpose is reflected in the preamble of the act, quoted at pages 17 and 18 of the Petition, which acknowledges the existence of an impending crisis in the provision of adequate health care to the people of Florida. Specifically, the statute's preamble sets forth that the cost of medical professional liability insurance had "skyrocketed," and that without some legislative relief from this heavy financial bur-

den, physicians and other health care providers would be forced to curtail their practices or retire, *inter alia*, with resulting obvious adverse effects on the general citizenry of the state, and that this problem has reached crisis proportion. This Court is no doubt aware of the medical malpractice insurance crisis existing nationwide in 1975, when this statute was enacted, and of the fact that there existed a substantial probability of drastic curtailment in the availability of health care services, as a result of the bitter controversy between malpractice insurance companies and the physicians they insured, and the physicians' justifiable concern over the economic risks of continuing to practice medicine without malpractice insurance coverage. This problem was acute in Florida and, indeed, was then the subject of ongoing litigation in the United States District Court for the Middle District of Florida in a cause titled *Argonaut Insurance Co. v. Florida Medical Association, Inc.*, Docket #75-140 Civ.-J.-T. (M.D. Fla. 1975)

In that proceeding, the largest medical malpractice insurance carrier in Florida was seeking a declaratory judgment that it was legally entitled to either dramatically increase the premiums it charged for malpractice policies, or to cancel such policies on relatively short notice and cease writing malpractice insurance in the state by the end of the year. The same insurer had also filed a dramatic rate increase for its malpractice policies, which rate filing was the subject of litigation in the District Court of Appeal, First District, State of Florida, simultaneously with the Federal District Court action noted below. In the Federal District Court action, the physician-members of the Florida Medical Association brought a class action counterclaim against the insurer, seeking injunctive relief against its proposed cancellation of malpractice policies for nonpayment of the increased premiums. All of this litigation was pending and unresolved at the time

of enactment of this statute. Thus, the state's legislature was indeed faced with a crisis in health care provision, it having been made clear that numerous physicians were seriously contemplating a "doctors' strike" in the event that the insurer was successful in its litigation, an action which would have drastically diminished the availability of adequate health care services to the citizenry of Florida. Indeed, such "doctors' strikes" were being considered throughout the nation for the same reasons, and occurred in some other states. Thus, the legislative determination that a crisis in health care services existed was clearly based on fact.

Petitioner strains at gnats in asserting that the legislative findings of an imminent crisis in health care provision were limited to physicians in high-risk insurance categories, and not inclusive of other physicians and hospitals. The malpractice insurance carrier who provided the bulk of the malpractice coverage in Florida provided such coverage to the majority of the state's physicians in all risk categories (and had increased its rates across-the-board) as well as providing coverage to a great number of hospitals, whose rates had been similarly increased. All of this was known to the Legislature at the time. Notwithstanding the above, however, the crucial point remains that numerous physicians in all risk categories were discussing the advisability of a "doctors' strike," or a drastic reduction of their practices, in the absence of some legislative relief. And, of course, hospitals cannot function without doctors. The results of such actions by the health care providers on the citizenry of the state are drastic and obvious.

Faced with such a situation, the legislature moved to solve the crisis by enactment of the statute here in question, dealing exclusively with medical malpractice. The fact that the

legislature did not choose to extend the mediation panel remedy of this statute to all tort actions, but instead limited it to medical malpractice actions, where the crisis existed, is not an arbitrary or invidious discrimination, but rather is a proper exercise of legislative discretion in determining to limit the remedy to the area where the crisis was most acute and the need for relief most seriously perceived. As noted above, the legislature, in enacting a statute making classifications, need not extend the remedy to the entire field of tort law, but may enact reforms one step at a time so long as classifications are reasonable. Indeed, Florida had previously enacted certain reforms in the negligence field in the form of a "no-fault" automobile insurance law, upheld against due process and equal protection claims by the Supreme Court of Florida in *Lasky v. State Farm Insurance Co.*, 296 So.2d 9 (Fla. 1974). The legislature did not invidiously discriminate against malpractice plaintiffs by enacting this statute, but rather proceeded to enact reforms one step at a time, beginning with the area in which the crisis was most acute; if experience proves the remedy worthwhile, the legislature may well extend it to all similar cases. This step-by-step approach is clearly permissible under the equal protection clause.

Petitioner next asserts that the statute denies equal protection by providing this remedy only as to certain classes of health care providers. The discussion above is, in large part, equally applicable here. In addition, it must be noted that Petitioner is not a chiropractor or other health care provider not covered by this statute, but rather is a patient bringing a malpractice action. Thus, Petitioner is without standing to assert the rights of such persons.

Leaving aside the question of standing, Petitioner's argument is without merit. In the name of the Equal Protection

Clause, Petitioner first argues that the statute, in view of the legislative findings embodied in its Preamble, should have been drawn so as to require a malpractice plaintiff suing a physician in a high-risk specialty to proceed through mediation while making no such requirement if the defendant physician practices in a low-risk area of specialization. Does equal protection of the laws *require* that a patient suing a cardiologist must conform to different procedures than those applicable to a patient suing a general practitioner? Clearly not. Indeed, such a classification system might well be held arbitrary and capricious. Accordingly, the legislature cannot be faulted on equal protection grounds for applying the mediation panel remedy to all physicians, hospitals and health maintenance organizations.

Petitioner then seeks to maintain the logically inconsistent argument that, once the remedy has been extended to physicians, it must also be applied to dentists, chiropractors and podiatrists as well, or be unconstitutional. It must be admitted that this argument possesses some superficial appeal; yet closer analysis reveals its flaw. None of these groups were involved in the malpractice controversy and litigation described above, nor were any of these groups seriously considering a "strike" or a drastic curtailment of their practices. In short, the crisis situation which impelled the legislative response embodied in this statute simply was not applicable to these groups. Why then, would there be any constitutional requirement that they be included within the scope of the mediation panel provision, when they are not within the scope of the crisis which accounts for its enactment? There is no more reason to include dentists and chiropractors within the scope of the mediation panel provisions than there would be to include engineers, lawyers or architects, all of whom are also occasionally subject to malpractice actions. The key

determinant of whether a statutory classification denies equal protection is whether there is a rational relationship between the legislative objective (here, assuring adequate health care for Florida residents) and the classification. The Legislature here made the obvious rational choice of lines of demarcation, applying the statutory remedy to those classes--and only those classes--involved in the crisis legislation. It might be noted, however, that subsequent malpractice legislation, proceeding on a step-by-step basis, has covered additional health care providers. Ch. 76-260, Laws of Florida 1976.

It appears to be Petitioner's contention that it is constitutionally impermissible for a legislature to enact statutory remedies discriminating among various types of claims brought in the courts, and that any classification of particular types of actions (such as malpractice suits) requiring procedures to be followed which are not required in all other types of action is constitutionally impermissible. However, this Court has expressly held to the contrary.

Thus, a New Jersey statute making a holder of less than 5% of the shares of a corporation's stock, if unsuccessful in a stockholder's derivative action, liable for expenses in certain situations, does not violate the Equal Protection Clause. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Similarly, equal protection is not denied by a specific statute of limitations applicabe only to actions under a state's "blue sky laws." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 *reh. den.* 325 U.S. 896 (1945). Specific statutory limitations applicable only to certain particularized types of actions have also been upheld in numerous cases by the Circuit Courts. See, for instance, *Empire State Ins. Co. v. Chafetz*, 302 F.2d 828 (5th Cir. 1962); *Harlow v. Ryland*, 172 F.2d 784 (8th

Cir. 1949); *Wilson & Co. v. City of Jacksonville*, 170 F.2d 876 (5th Cir. 1949); *Hardware Mutual Ins. Co. v. Jacob Hieb, Inc.*, 146 F.2d 447 (8th Cir. 1945). The controlling test is whether the classification of the particular type of action has a rational basis. As noted above, the classification here in question has such a rational basis, and thus does not violate the Equal Protection Clause.

Petitioner's final equal protection argument is based upon a contention that this statute arbitrarily discriminates against plaintiffs in medical malpractice actions, and in favor of defendants, by requiring the plantiff to initially submit her claim to a medical mediation panel, while permitting the defendant to "waive" such a panel. In effect, Petitioner's argument is that both plaintiff and defendant must be accorded exactly the same procedural rights in order to comply with the Equal Protection Clause. Nothing could be further from the truth. The law is replete with situations in which different and unequal requirements are applicable to plaintiff and defendant in any action. Thus, for example, plaintiff in a civil action, but not the defendant, is given a choice of venue. See, for example, Florida Statute §§ 47.011, 47.021, 47.041 and 47.051.

Similarly, the plaintiff in any action, but not the defendant, may take a voluntary non-suit. See, for example, Fed. R. Civ. P. 41(a) and Rule 1.420(a)(1), Fla. R. Civ.P. A plaintiff having a cause of action against multiple defendants has the option of either joining all of the defendants in a single action, or filing different actions against each defendant, while the defendant has no corresponding right. In none of these instances is there any violation of the equal protection provisions of the Constitutions. If, as Petitioner argues, all parties litigant must stand on *exactly* the same footing, and be

entitled to *exactly* the same privileges, a defendant, just as a plaintiff, would have a right to take a voluntary non-suit, to choose venue, or to require that all defendants in a situation involving multiple defendants be sued in one action or sued in differing actions, at defendant's option. The fact that this is *not* the law itself argues persuasively against Petitioner's position that plaintiff and defendant in a civil action must be given exactly the same privileges and burdens. Basic equality and fairness is what is required. Accordingly, it is submitted, the mere fact that a malpractice plaintiff is required to submit her claim to a mediation panel, while the defendant is not mandatorily required to submit to the mediation panel, is not, in and of itself, sufficient to demonstrate a violation of the equal protection provisions of the Constitution.

It is in fact doubtful that any defendant can, in a strict sense, be *required* to take *any* procedural step. Thus, for instance, a defendant in a civil suit is not required to submit his defense by filing an answer to the complaint; rather, the law provides certain specified sanctions to be applied to those who fail to meet procedural "requirements," as by providing for a default against defendant in the above example. See, for example, Fed. R. Civ. P. 55(a), and Rule 1.500, Fla. R. Civ. Proc. The underlying reason, of course, is that plaintiff, who actively seeks relief from the courts, may be required to comply with certain procedures in order to obtain what he is seeking, whereas defendant, who is not actively seeking the intervention of the courts, may not be required to take affirmative action, although his failure to do so may be sanctioned by appropriate penalties. The sanction imposed upon a malpractice defendant who fails to file an answer in mediation proceedings is discussed below.

As regards this portion of the Petitioner's argument, it might

be observed that she is attempting to "have her cake and eat it too." Petitioner previously complained that she was required to submit her complaint to a mediation panel, thereby entailing delay in the ultimate disposition of her claims. Now she complains that the physician-defendant, by failing to file an answer in these proceedings, can avoid this delay, thus giving Petitioner the speedy access to the Courts of which she complains the provision deprives her. Petitioner's argument is logically inconsistent in this regard.

As intimated above, the provisions of Florida Statute §768.133 (2), allowing a malpractice plaintiff to proceed to the Circuit Court, upon failure of the defendant to file an answer within twenty days, acts as a sanction on the defendant for not complying with the mediation provisions. Thus, the mediation panel provides the defendant a means of some limited discovery of the basis of plaintiff's claim, under judicial supervision, thus giving the defendant an opportunity to evaluate the merits of the charge, in order that he might either consider the possibility of settlement of the claim or to attempt to demonstrate to plaintiff that the charges are groundless, thus (perhaps) avoiding all litigation. Where a particular claim can be shown to the mediation panel to be non-meritorious, these proceedings can allow the defendant to introduce into evidence in any subsequent court action the mediation panel's finding that he was not actionably negligent. Florida Statute §§ 768.133(8) and (9). If defendant fails to file an answer within twenty days, the statute allows plaintiff to immediately proceed to the Circuit Court, thereby depriving defendant of these potential benefits. The effect of the statute's "waiver" provisions is thus to provide a *sanction* against a defendant for failing to avail himself of the mediation provisions.

When a defendant fails to file an answer in the mediation proceedings, the Legislature imposed the sanction of depriving him of any benefit he might obtain from mediation as noted above, rather than imposing the sanction of entering a default against him. This is quite reasonable since default, under Petitioner's reasoning, would result in a factual finding (not based on any evidence, since none would have been introduced) that the defendant had been professionally negligent, which finding would be admissible in evidence in a subsequent civil suit under Florida Statute §768.133(11). Nowhere is it written in stone that the only possible sanction for failing to answer is entry of a default, although this is a commonplace method of sanctioning such conduct. See, for example, Rule 1.500 (a), Fla. R. Civ. Proc. However, in view of the limited availability of the results of mediation in a subsequent civil action, it is submitted that a failure to answer in such a proceeding is more akin to the failure of a party in a civil action to answer interrogatories, in which case the rules provide various sanctions, among which is the entry of an order prohibiting a party who fails to comply with an order compelling discovery from introducing designated matters in evidence. See, for example, Fed. R. Civ. P. 37 (b)(2)(A), and Rule 1.380 (b)(2)(A), Fla. R. Civ. Proc. It is submitted that the sanction provided by Florida Statutes §768.133 is analogous in that it precludes a defendant who fails to answer the claim from introducing into evidence a potential finding by the mediation panel that he was not negligent. Thus, the practical effect of the section is to provide a sanction against a defendant who fails to answer the mediation claim.

The wisdom of the legislative determination that this is an appropriate sanction is not here in question, just as this case does not involve the wisdom of the entire statute, but

rather its constitutionality. As demonstrated above, the statute does not violate the Equal Protection Clause, inasmuch as the legislative classification of malpractice actions as those in which the mediation panel remedy should be provided is a rational one, and not arbitrary, capricious, or unreasonable. The mere fact that a defendant who fails to avail himself of the mediation proceedings is not more heavily sanctioned certainly does not give rise to a violation of the Equal Protection Clause. Accordingly, Petitioner's argument in this regard is groundless.

POINT II

DOES FLORIDA STATUTE §768.133 VIOLATE THE DUE PROCESS PROVISIONS OF AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION?

Petitioner bitterly complains that the mediation panel procedures are such as to deprive her of due process of law in numerous ways. Her initial complaint in this regard is that the provisions of Florida Statute §768.133(7), dealing with the introduction of evidence in the mediation panel proceedings, somehow violate due process. However, Petitioner fails to point out that this same section provides that she may call witnesses and has the right to subpoena witnesses and evidence, just as she would in a Circuit Court proceeding. Instead, Petitioner presents a parade of horribles which, under the statute, could only come about if Petitioner totally failed to avail herself of the right to call witnesses and subpoena witnesses and evidence.

Thus, for instance, Petitioner asserts that the statute would allow the members of the mediation panel *sua sponte* to bring

in textbooks which they regard as authoritative, on the basis of the statute's provision that "other documents may be produced and considered by the panel." Clearly, such a construction of the statute is outrageous.

The clear import of this language is that the evidence may be produced by the parties and considered by the panel, not that the mediation panel members themselves may produce and then consider evidence. As noted above, Transition Rule 21(h), applicable to these proceedings, provides that the judicial referee, a Circuit Judge, has exclusive authority to rule on the admissibility of evidence, is responsible for the conduct of the hearings, and must conduct them in such manner as to best ascertain the rights of the parties. To intimate that a Circuit Judge would allow a member of a panel to bring in "authoritative textbooks" without notice to the parties and rely on them as authority for his decision is a slander on the judiciary of Florida.

Similarly, Petitioner asserts that due process is violated by the lack of any specified procedure allowing the parties to question the panel members to determine if there is any potential bias against them. In so doing, however, Petitioner overlooks the provision of the statute allowing parties to challenge panel members for cause. Florida Statute §768.133 (3). Similarly, this argument overlooks the provisions of Transition Rule 21(g), which specifies that:

> "Challenges for cause to prospective members of Medical Liability Mediation Panels shall lie whenever it appears that a prospective member has any bias or prejudice in the matter. Challenges shall be presented to the Judicial Referee and liberally construed by the Judicial Referee so as to obtain an unbiased and unprejudiced panel. A party objecting to a prospective

> panel member may introduce any competent matter to support the objection. The Judicial Referee is a judicial officer and challenges to the Judicial Referee shall be made in accordance with Chapter 38, Florida Statutes, and the Code of Judicial Conduct."

Thus, this argument is clearly without any basis. In effect, Petitioner is asserting that she should have the right to conduct voir dire of the panel, a procedure which would be much akin to giving a plaintiff in U. S. District Court the right to conduct a voir dire of the District Court Judge.

Petitioner next complains that the determination of the medical liability panel is admissible in evidence in subsequent Circuit Court proceedings. It should be noted that the statute specifies that "no specific findings of fact shall be admitted into evidence at trial" and that "[t]he jury shall be instructed that the conclusion of the hearing panel shall not be binding but shall be accorded such weight as they choose to ascribe to it." Florida Statute §768.133 (11). Thus, the determination of the panel is simply an additional item of evidence which may be presented to the jury in a subsequent civil action, with the jury to be specifically instructed by the Court that that determination is not binding, and may be given whatever weight the jury determines to ascribe to it. Petitioner asserts that the mere fact of introduction of the mediation panel determination will so overwhelm the jury as to deprive the losing party in the mediation proceeding of due process. The groundlessness of this argument is perhaps best seen by a comparison with the provisions of §5 of the Clayton Act, 15 U.S.C. §16. That statute permits a final judgment or decree rendered in any civil or criminal antitrust proceeding brought by the United States to be admitted into evidence against the defendant in any subsequent private

antitrust action against that defendant as to all matters respecting which the prior judgment would be an estoppel as between the government and defendant.

Thus, the Clayton Act provision allows a jury to consider not a mere majority determination by a Circuit Judge, an attorney and a physician, (with specific instructions that that determination is not binding and can be accorded as little weight as they desire), but rather a finding by a U. S. District Judge and a unanimous jury (perhaps affirmed by this Court) that the defendant has violated the law, and that the United States government, in all its majesty, has successfully prosecuted them and proven them guilty beyond and to the exclusion of all reasonable doubt. Yet this statute has never been held constitutionally impermissible. Indeed, it has been specifically stated that this section "does not abridge the right of trial by jury or take away any of its incidents, nor does it in anywise work a denial of due process of law. . ." *Purex Corp., Ltd. v. Proctor and Gamble Co.*, 453 F.2d 288, 291 (9th Cir. 1971) *cert. den.* 405 U.S. 1065. See also *Meeker and Co. v. Lehigh Valley R.R.*, 236 U. S. 412, 430 (1915), upholding a similar statute against such attack.

If anything, the provisions of 15 U.S.C. §16 would present far *more* of a due process problem than the provisions here in question, inasmuch as the mediation panel's findings result from a contest directly between the parties to the same proceeding, whereas the Clayton Act provision allows the findings of a court and jury in one trial to be admitted into evidence in a totally different proceeding. If a jury is overawed by the panel findings, as Petitioner asserts, how much more would they be overawed by the finding of a unanimous jury, approved by one or more members of the Federal Judiciary, that the United States government had proven beyond

a reasonable doubt that the defendant before them had violated the fundamental economic policies of the nation? Furthermore, unlike the mediation panel provisions here, 15 U.S.C. §16 expressly provides that the judgment in the government's antitrust proceeding is prima facie evidence against the defendant in the civil proceeding; the jury is not instructed that they can afford such a finding as little weight as they wish, but rather is instructed that, unless the government decree is rebutted by defendant's evidence, the private antitrust plaintiff is presumed to have met his burden of proof on the issues covered by the government's prior case.

In view of this, we are completely unable to discern how Petitioner can possibly claim that the mere fact of admissibility of the mediation panel's determination can be held to violate due process, especially since the jury is expressly instructed that such determination is not binding on them and can be given as little weight as they desire.

Next, Petitioner asserts that, if a malpractice plaintiff's action is directed against more than one health care provider, the statute would require her to go through numerous mediation proceedings before allowing her to proceed with her action in Circuit Court. Petitioner claims that this would either involve her in numerous simultaneous mediation panel proceedings or would interminably delay the filing of the civil suit by calling for consecutive mediation panel proceedings up to four months apart. This contention is simply not factually accurate. Petitioner's argument is completely based on the contention that "the act provides that the physician may be judged only by a member of his own specialty" (petition at page 30), yet Petitioner gives no authority for this contention. In plain fact, an examination of the statute indicates that this is simply not true. What the statute *does*

provide is that the parties may stipulate to the type of medical specialist who should determine the claim, but that if they cannot agree on the type of specialist, the judicial referee makes the determination. The statute clearly contemplates that the physician member of the panel be of the defendant's specialty where possible, but he may be of a different specialty in appropriate cases. The statute does not make the requirement as Petitioner asserts. Accordingly, there is simply no basis for the Petitioner's argument that multiple mediation panels for a single claim could possibly be required under the statute.

Similarly, Petitioner claims that she is deprived of due process in that the mediation panel assigned to her cause may err in the admission of evidence, or in some other regard, and that she would have no immediate remedy to rectify such error prior to the initiation of the Circuit Court proceedings. Petitioner raises the contention that the method of review of mediation panel errors available to her would be by petition for certiorari to the District Court of Appeal pursuant to Rule 4.1 of the Florida Appellate Rules. However, even the most perfunctory perusal of that rule reveals that it would not be applicable, but rather deals solely with the review of orders and determinations of administrative boards. Petitioner's method of review of asserted errors on the part of the mediation panel would be by appeal from the determination of the jury (assuming she lost in the jury trial) or, perhaps, by interlocutory appeal pursuant to Rule 4.2 of the Florida Appellate Rules. Assuming that interlocutory appeal were available as a remedy, the appealing party could properly request the District Court of Appeal to stay proceedings in the lower court pending determination of the appeal, assuming that the parties did not stipulate to a stay of the action.

Assuming, however, that interlocutory appeal is not available in these circumstances, it quite simply is not a denial of due process of law to delay appellate review of the trial court's admitting into evidence the findings of the mediation panel, so long as an adequate remedy on appeal is available. Petitioner's position, in a nut-shell, is that the possibility exists that the mediation panel would err in some regard and that the admission of the mediation panel's determination, if based on proceedings in which error was committed, is so fundamental that due process demands immediate pre-trial appellate review. Petitioner fails to point out in what regard this situation is so fundamentally different from an erroneous ruling of the trial court during a pre-trial conference as to the admissibility of an item of evidence, or as to an erroneous ruling of a trial court in any other regard. Petitioner's basic (albeit unexpressed) premise is that due process requires that she have an immediate appeal each and every time she conceives that an error has been committed anywhere along the proceedings. The law, of course, does not require this. In point of fact, the courts have been quite studious in limiting the availability of interlocutory appeals, and the situations in which interlocutory orders may be appealed prior to final judgment are quite restricted. See, for instance, 28 U.S.C. §1292(b). Yet Petitioner's argument would indicate that each limitation on the availability of *immediate* appellate review of rulings of the trial court would be violative of the Due Process Clause.

Petitioner's final due process argument rests upon an asserted "right to immediate access to the Court." (Petition at page 31). Petitioner cites no authority whatsoever for her assertion that there is a right of *immediate* access to the courts, for the simple reason that there is no such authority. If the existence of a requirement that certain proceedings be

completed prior to instituting litigation were held constitutionally impermissible, the entire doctrine of exhaustion of administrative remedies would be unconstitutional and void, since that doctrine, where applicable, requires that administrative proceedings be completed prior to any resort to the courts. See, for instance, *Pest Control Commission of Florida v. Ace Pest Control, Inc.*, 214 So.2d 892 (Fla.App. 1st 1968); *Hoffman v. Board of Control*, 172 So.2d 874 (Fla.App. 1st 1965). The Fourteenth Amendment does not in any way undertake to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided that the method of procedure adopted for such purposes gives reasonable notice and affords fair opportunity for the parties to be heard before issues are decided. *Sas v. State of Maryland*, 334 F.2d 506 (4th Cir. 1964); *Shemaitis v. Reid*, 193 F.2d 119 (7th Cir. 1952). Thus, many states have incorporated within their divorce (or dissolution of marriage) statutes a "cooling-off" period, which inherently lengthens a divorce proceeding by building in a delay of several months or more. Yet, despite numerous constitutional attacks, it has never been held that such a "cooling-off" period was unconstitutional.

Numerous instances may be cited of situations in which court actions involve delays of various kinds, none of which has ever been held unconstitutional. Thus, for example, courts of equity have long had the power to refer matters brought before them to a Master (see, for instance, Fed. R. Civ. P. 53, and Rule 1.490, Fla. R. Civ. Proc.) and such reference involves delays in the processing of the cause. This has never been held to be unconstitutional as depriving a party of due process of law. Another comparable situation is that of a landowner alleging that the zoning of his real property had deprived him of its use; the law requires him to exhaust available nonjudicial remedies before bringing his action into the courts. See, for instance, *DeCarlo v. Town of West Miami*, 49 So.2d 596 (Fla. 1951); *Wood v. Twin Lakes Mobile Home Village, Inc.*, 123 So.2d 738 (Fla.App. 2d 1960). Further analogy could be made to such matters as disbarment proceedings, where substantial rights are very seriously involved, and where certain nonjudicial actions must be taken before any action may be filed in the courts of Florida. See Rules 11.04, 11.06 and 11.09, Article XI, Integration Rule of Florida Bar.

Each of these examples serves to point out the fact that there is no unmitigated and unbridled constitutional right to file an action in the courts at a time of plaintiff's own choosing. Rather, the constitutional right that the plaintiff does have is to file her action at a time of her choosing, if the time so chosen meets the requirements of applicable statutory and case law. Where the time chosen by plaintiff to file her action does not meet the requirements of statutory or case law, as where the statute of limitations has expired or the plaintiff has failed to exhaust administrative remedies, the plaintiff's action is subject to dismissal. The same is true in the instant cause. Statutory law has prescribed that before filing her action in the Circuit Court, plaintiff must first proceed through mediation procedures prescribed by Florida Statute §768.133.

It should be emphasized that the statute in question does not preclude a malpractice plaintiff from resorting to the courts following mediation, nor in any way limit, restrict or condition plaintiff's access to the courts, regardless of what the outcome of the mediation proceeding may be. The only conceivable situation in which any malpractice plaintiff could possibly be deprived of access to the court under this statute is where plaintiff has totally failed to comply with the statu-

tory requirement of submitting the claim to mediation. The statutory draftsman took great pains to insure that a plaintiff was entitled to proceed in the Circuit Court regardless of the outcome of the mediation proceeding, and further insured that the statute of limitations would not run during these proceedings. In point of fact, the filing of the claim before the mediation panel extends the statute of limitations. The only way in which a plaintiff can be deprived of access to the courts by this provision is by wilfully failing to file a claim in mediation proceedings. This, however, does not deprive the plaintiff of her right of access to the courts, any more than does the well established doctrine of exhaustion of administrative remedies.

In situations where that doctrine is applicable, the courts will dismiss a claim where the plaintiff has failed to exhaust available administrative remedies, allowing the plaintiff to proceed in court only after doing so. Similarly, if a malpractice plaintiff were to file a complaint in the Circuit Court without first proceeding through mediation as required by the Statute, the court would dismiss the complaint. The plaintiff could then promptly file the mediation claim, and, upon the determination of those proceedings, once again proceed in Circuit Court. The only possible circumstance in which a plaintiff could be deprived of access to the Circuit Court is where he allowed the statute of limitations to run before filing the claim initially; in that case, it would be the statute of limitations, not Florida Statute §768.133, which bars the claim. Clearly, Petitioner is not contending that the statute of limitations contravenes due process of law.

It is submitted that Petitioner has totally failed to show any violation of the Due Process Clause, and accordingly that her argument under this point is without merit.

POINT III

DOES FLORIDA STATUTE §768.133 VIOLATE PLAINTIFF'S RIGHT TO A TRIAL BY A JURY OF HER PEERS?

Petitioner here complains that the statute violates her right to trial by jury. Petitioner cites many cases for the proposition that no state may constitutionally deprive a plaintiff of her right to trial by jury, but totally fails to show in what way the statute here in question could ever have such an effect.

Before further responding to the Petitioner's argument under this contention, however, it should be pointed out that this question was never raised in the courts below. Rather, Petitioner's contentions below were that the statute violated the Due Process and Equal Protection clauses, as well as the Privileges and Immunities Clause and various provisions of Florida's state Constitution, none of which dealt with the right to trial by jury. Accordingly, the point not having been argued below, it cannot now be raised. *Shelley v. Kraemer*, 334 U.S. 1 (1948);; *Williamson v. Weyerhauser Timber Co.*, 221 F.2d 5 (9th Cir. 1955); *Keyes v. Madsen*, 179 F.2d 40 (D.C. Cir. 1950) *cert. den.* 339 U.S. 928. Nonetheless, we will respond to Petitioner's argument out of an abundance of caution.

Petitioner totally fails to indicate in what manner the statute here in question deprives her of her right of trial by jury. As noted above, this statute in no way tends to preclude trial by jury of malpractice actions, but merely requires a plaintiff in such proceedings to go through a mediation proceeding prior to commencement of the jury trial. It appears that this procedural requirement is the basis of petitioner's claim, in-

asmuch as she cites *Wright v. Central DuPage Hospital Assn., supra*, for the proposition that the Illinois Medical Review Panel procedure established by the Illinois statute was an unconstitutional prerequisite to a jury trial. Indeed, this is the only authority asserted in the petition for this contention. Yet, as noted above, the Illinois court did not decide that cause on the basis that the statute there in question deprived a plaintiff of her right to trial by jury--although indicating in dicta that it would so hold--but rather held, at 347 N.E. 2d 740, that the statute was unconstitutional under Illinois' state Constitution because it empowered nonjudicial members of the panel to exercise judicial functions. As noted above, such is not the case with the Florida statutes.

Petitioner's contention under this heading is that the imposition of a procedural prerequisite to jury trial is an unconstitutional impairment of the right to jury trial. Obviously, the bald statement of the contention carries with it its own refutation, since there are many procedural prerequisites before a plaintiff can obtain a jury trial. Thus, for instance, under federal rules and practice, a plaintiff must show to the court the existence of one or more genuine issues of material fact in order to withstand a motion for summary judgment under Fed. R. Civ. P. 56 and thus obtain a jury trial. Similarly, the sanction of dismissal of a plaintiiff's claim for failure to prosecute or to otherwise comply with the rules is authorized under Fed. R. Civ. P. 41(b). Both of these rules imply procedural prerequisites to the obtaining of a jury trial. Under Petitioner's argument, however, such procedural prerequisites would be unconstitutional. Clearly, this is not the case. Many similiar examples could be set forth, but the point remains the same: the mere fact that statutory law or rule imposes a procedural prerequisite to trial by jury does

not, in and of itself, unconstitutionally deprive a party of the right to trial by jury.

This being true, Petitioner's argument must be that there is something inherent in the mediation panel procedure itself which constitutes an impairment of the right to trial by jury. However, Petitioner totally fails to indicate in what matter this might be true. Both respondents and this Court are left completely in the dark as to exactly how the statute is alleged to violate the right to trial by jury. It is submitted that the solution is both simple and obvious, that there is no deprivation or impairment of the right to trial by jury.

CONCLUSION

For the reasons stated above, Respondents submit that the provisions of Florida Statutes §768.133 violate neither the Equal Protection Clause, the Due Process Clause nor the right to trial by jury, and that Petitioner has shown no compelling reason for this court to exercise its discretion pursuant to Rule 19, Rules of the Supreme Court, to grant the petition. Accordingly, it is submitted, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to Jos. D. Farrish, Jr., Esquire, 316 First Street, West Palm Beach, Florida 33402; F. Kendall Slinkman, Esquire, 316 First Street, West Palm Beach, Florida 33402; and Walter Stockman, Esquire, Holiday Office Center, 1325 N. Atlantic Avenue, Cocoa Beach, Florida 32931, Attorneys for Petitioner; Robert Shevin, Attorney General, Capitol Building, Tallahassee, Florida 32304, Attorney for State Amicus Curiae; and John E. Thrasher, Esquire, 731 May Street, Jacksonville, Florida 32204, Attorney for Florida Medical Assn., Amicus Curiae, by mail this the 22nd day of November, 1976.

ATTORNEY